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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

October Term, 1948

No. 90

LEE H. BENSLER, Individually, Now residing in Davidson County, Tennessee, Collector of Internal Revenue, District of Tennessee, Petitioner

vs.

UNION PLANTERS NATIONAL BANK & TRUST COMPANY, a National Bank at Memphis, Tennessee, et al., etc.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 11, 1948
CERTIORARI GRANTED OCTOBER 11, 1948

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 90

LIPE HENSLEE, Individually, Now residing in Davidson County, Tennessee, Collector of Internal Revenue, District of Tennessee, *Petitioner*,

vs.

UNION PLANTERS NATIONAL BANK & TRUST COMPANY, a National Bank at Memphis, Tennessee, *et al.*, etc.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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1 In the United States District Court
For the Middle District of Tennessee.
(File Endorsement Omitted.)

No. 760

UNION PLANTERS NATIONAL BANK & TRUST COMPANY, A National Bank at Memphis, Tennessee, and WILBURN K. NOELL, a Resident Citizen of Memphis, Tennessee, Executors of the Estate of William Bate Williams

Appellants-Plaintiffs

v.

LIPE HENSLEE, Individually, Now Residing in Davidson County, Tennessee, Collector of Internal Revenue, District of Tennessee

Defendant-Appellee

Complaint—Filed October 8, 1946

For their cause of action the plaintiffs respectfully show the Court:

I.

That on July 22nd, 1943, William Bate Williams, a resident citizen of Shelby County, Tennessee, died, leaving a last will and testament, and your plaintiffs were duly
2 appointed executors of said last will and testament on July 30, 1943, by the Probate Court of Shelby County, Tennessee, and after having qualified, letters testamentary were duly issued to them. A copy of said letters testamentary and last will and testament are attached herewith, marked Exhibit "A".

The defendant, Lipe Henslee, was appointed Collector of Internal Revenue for the State of Tennessee on the 17th day of April, 1944, and has acted as such continuously since that date and was at all times the Collector of Internal Revenue during the period hereinafter mentioned in this complaint.

II.

Your plaintiffs now show that after having made careful surveys and inventories of said estate they determined and estimated that the gross value thereof was $508,411.17, and that the necessary expenses would reduce said estate to a net value of $426,899.10.

Your plaintiff now shows the Court that Item VI of said last will and testament of William Bate Williams,

Deceased, is a residuary clause, which bequeaths the balance of the estate, after paying certain specific bequests, to four corporations, operated exclusively for charitable purposes: Mary Galloway Home for Aged Women, Crippled Children's Hospital School, The Home for Incurables and Sunshine Home for Aged Men, all charities under the laws of Tennessee, and located in the City of Memphis.

On the 26th day of October, 1944, your plaintiffs, as executors, filed the Federal Estate Tax return for said estate with the defendant as Collector of Internal Revenue at Nashville, setting out the net taxable value of said estate in the sum of $305,029.85, after deducting the value of the above mentioned charitable bequests in the sum of $121,869.20.

3 Your plaintiffs aver that said deductions for charitable bequests are made pursuant to Section 812 (d) of the Internal Revenue Code.

Your plaintiffs aver that the said bequests have a present ascertainable value, and there is no uncertainty appreciably greater than the general uncertainty which attends human affairs.

On the 9th day of March, 1945, the Collector of Internal Revenue made a deficiency assessment against said estate in the sum of $1,920.61, and thereupon your plaintiffs, as executors, paid said tax, including said deficiency assessment without protest, and your plaintiffs now aver that said payment was proper and legal, and a full payment of the amount of estate tax due.

Your plaintiffs now aver and show, however, that on August 10, 1945, an additional deficiency assessment was made against your plaintiffs as executors of said estate in the sum of $33,081.52, and as a basis for said deficiency assessment the Collector of Internal Revenue disallowed the charitable bequests deducted on the Federal Estate tax return filed, on the ground that Item III of the said last will and testament was such as to allow the life beneficiary, to-wit: Elizabeth Bate Williams, the mother of the Deceased, to encroach on the corpus of the estate. A copy of said notification is herewith attached marked Exhibit "B".

On September 6, 1945, within the time allowed by law your plaintiffs filed a sworn protest to said deficiency assessment with the defendant, Lipe Henslee, the Collector of Internal Revenue, at Nashville, Tennessee. A copy of said protest, which sets forth both the facts and the law, is herewith attached, marked Exhibit "C".

On September 26, 1945, the defendant, Lipe Henslee, as Collector of Internal Revenue, overruled said pro-
4 test and thereupon your plaintiffs requested an oral hearing on said protest, which was granted, and after several postponements said protest held in the office of the Collector of Internal Revenue on March 19, 1946, at which time the overruling of said protest was duly affirmed and the deficiency assessment was approved.

Your plaintiffs show that the original Federal Estate tax of $62,368.62, together with the small deficiency tax, was duly and properly paid.

Your plaintiffs now show that after taking the necessary steps to protest the deficiency assessment tax they paid into the hands of your defendant the sum of $35,899.12, which consisted of the deficiency assessment tax of $33,081.52, together with interest thereon of $2,817.60.

Your plaintiffs aver that on April 18, 1946, on Form 843 of the Treasury Department they filed a claim for a refund of said amount. On August 14, 1946, said claim for refund was denied by the Commissioner of Internal Revenue. A copy of the notice of said denial is herewith attached, marked Exhibit "D".

Your plaintiffs aver that the said deficiency assessment which disallowed the charitable deductions was illegal and that the payment by your plaintiffs of said sum in full of said deficiency tax was illegal and wrongful and that the defendant, Lipe Henslee, has in his hands said sum, which he is wrongfully and illegally withholding.

Your plaintiffs, therefore, have filed this suit in order to recover said sum of $35,899.12; with interest thereon until said sum is paid.

III.

Your plaintiffs now aver that said assessment and the deficiency tax imposed thereon was illegal and,
5 therefore, said tax was wrongfully collected upon the following grounds:

1. There is no reasonable human possibility that the beneficiary, Elizabeth Bate Williams, the mother of the deceased, would have at any time encroached on the corpus of this estate, and, therefore, a proper survey of said estate plainly shows that there was a reasonably and fixed standard by which the value of the charitable bequests could be ascertained. In this connection your plaintiffs show

(a) That the said Elizabeth Bate Williams is now eighty-eight years of age, with a life expectancy of approx-

imately three years. That she has no dependents and no close relatives whatsoever.

(b) That she has an independent estate of her own of approximately the value of $100,000.00.

On June 15, 1945, she purchased from your executors a building located at 45 Union Avenue, City of Memphis, for $30,000.00 cash, which yields her a net income of approximately $200.00 per month. That in addition to this she owns her own home in Memphis and a summer home at Monteagle, Tennessee.

(c) The said Elizabeth Bate Williams, therefore, has an income of approximately $250.00 to $300.00 per month over and above the $750.00 per month provided in the will. That in December, 1944, your executors paid her the sum of $16,500.00 in cash in settlement of a claim against the estate; that her mode of living is simple and economical and has not changed materially from her manner of living prior to the death of the testator, nor since the death of the testator. She has made no request or demand of any character for additional funds over and above the said $750.00. The actual living expenses of Mrs. Williams are considerably less than $750.00 per month and she has been steadily saving additional sums out of this amount.

6 IV.

Your executors now show that at the time of the death of the testator a reasonable survey of his estate showing its value and the income which it was then producing and would produce in the future showed that there would be a very considerable excess in income over and above the $750.00 required to be paid to the mother of the testator.

Your executors now show that this has been demonstrated by the passage of time and that during the more than three years since the death of the testator the estate has yielded a net income of approximately $15,000.00 per annum after charging off all expenses, with the result that there is an excess income of more than $6,000.00 per annum, which has accumulated. There is now on hand more than $18,000.00 of accumulated income which would have to be exhausted before any encroachment on the corpus of the estate.

Your plaintiffs aver that the statement contained in the denial of the claim for refund dated August 14, 1945,

to the effect that the funds to be expended for the life beneficiary cannot be reliably determined and that no fixed standard governing the amount of funds for the requirement of the life beneficiary is not correct. On the contrary your plaintiffs now aver that the value of the charitable bequests can and was reliably determined by your plaintiffs and that there is a fixed standard by which this value was ascertained.

Your plaintiffs, therefore, aver that there was no possibility that the life beneficiary would ever invade the corpus of the estate. Your plaintiffs as executors carefully examined these facts immediately after the death of the testator and now show the Court that in making the deductions for the charitable bequests they were governed by this fixed standard and that the excess tax levied on the charitable bequests was illegal.

7 Your plaintiffs, therefore, again aver that the payment of the said sum of $35,899.12 was illegal and that the defendant, Lipe Henslee, is now holding said sum in his hands and is liable personally to your plaintiffs for the return thereof, together with interest until said amount is actually paid.

WHEREFORE, your plaintiffs bring this suit for the sum of $40,000.00, and ask that judgment be rendered against the said Lipe Henslee for said amount.

SAM P. WALKER,
D. T. PAGE,
Attorneys for Union & Planters National Bank & Trust Company, and Milburn K. Noell, Executors of the Estate of William Bate Williams,
1905 Sterick Building,
Memphis, Tennessee.

WARING, WALKER & COX,
Of Counsel.

8 *Duly sworn to by R. N. Lloyd.*
Jurat omitted in printing. (*All in italics.*)

Issue and service of summons are waived and receipt of a copy of the foregoing complaint is hereby acknowledged, this October 8, 1946.

HORACE FRIERSON,
U. S. Attorney.

9 *Exhibit "A"—Filed October 8, 1946*

LETTERS TESTAMENTARY

(File Endorsement Omitted.)

State of Tennessee, }
Shelby County. } ss.:

To Union Planters National Bank & Trust Company and Milburn K. Noell

It appearing to the Probate Court now in session, that William Bate Williams has died, leaving a WILL, and the Court being satisfied as to your claim to administration, and you having qualified as directed by law, and the Court having ordered that Letters Testamentary be issued you without bond.

THESE ARE, THEREFORE, to authorize and empower you to take into your possession and control all the goods, chattels, claims and papers of said testate, and return a true and perfect inventory thereof to our next Probate Court; to collect and pay all debts, and to do and transact all the duties in relation to said estate which lawfully devolve on you as Executors, and after having settled up said estate, to deliver the residue thereof to those who are by law entitled.

WITNESS MARVIN POPE, Clerk of Said Court, at office, this 30 day of July, 1943.

MARVIN POPE,
Clerk.
By TOM B. CRENSHAW D.C.

(L. S.)

10 State of Tennessee, }
Shelby County. } ss.:

I, John W. McGoldrick, Clerk of the County and Probate Courts of said County, do hereby certify that the foregoing one page contains a full, true and perfect copy of the Letters Testamentary issued to Union Planters National Bank & Trust Company and Milburn K. Noell as executors of the estate of William Bate Williams deceased as the same appears in record in Executor's Bond Record No. 15 page 128 now on file in my office, and that same still remain in full force and effect.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at office, in the City of Memphis, this 24th day of September, 1946.

MARVIN POPE,
Clerk.
By LUCILLE BARR D.C.

(SEAL)

11 LAST WILL AND TESTAMENT OF WILLIAM BATE WILLIAMS

I, William Bate Williams, being of sound mind and disposing memory, do make and publish this my last will and testament, revoking all others heretofore made by me.

Item I.

I wish all of my just debts paid.

Item II.

I hereby nominate Milburn K. Noell and the Union Planters National Bank and Trust Company of Memphis, Tennessee, as executors of this my last will and testament, and likewise I appoint them as trustees to administer and manage my estate during the lifetime of my mother, Elizabeth Bate Williams, as hereinafter set forth.

The said executors and trustees are to act jointly in all matters and are excused from giving any bond but are to make their legal settlements to the Probate Court of Shelby County, Tennessee, in accordance with the Tennessee laws.

In the event it is necessary to have an executor appointed in the State of Arkansas I hereby nominate and appoint Charles W. Norton of Forrest City, Arkansas, and the said Milburn K. Noell solely as executors of my personal estate in Arkansas and as ancillary executors of my estate in Tennessee. On final disposition of my estate in Arkansas the said executors are to make final settlement with the executors and trustees in Tennessee heretofore named.

12 I further direct that Sam P. Walker be employed by my executors and trustees as the attorney to look after and attend to all legal matters of my estate and the trust hereinafter created.

Item III

I hereby devise and bequeath all of my property, real, personal and mixed, wheresoever located, including all insurance of any kind, to the said Milburn K. Noell and the Union Planters National Bank and Trust Company, as trustees, to be administered for the use and benefit of my beloved mother, Elizabeth Bate Williams, for and during her natural life, with the full power and authority herein conferred.

I hereby direct both my executors and my trustees to pay to my mother the sum of Seven Hundred Fifty (750:00) Dollars a month to be used by her as she sees fit. In the event the income from my estate is not sufficient

to pay the said Seven Hundred Fifty ($750.00) Dollars each month, then my executors and trustees are hereby empowered, authorized and directed to encroach on the corpus of the estate to pay said amount and to sell any of my property, real or personal, for this purpose.

In addition to this amount my said executors and trustees are authorized and empowered to use and expend in their discretion any portion of my estate, either income or principal, for the pleasure, comfort and welfare of my mother.

The first object to be accomplished in the administration and management of my estate and this trust is to take care of and provide for my mother in such manner as she may desire and my executors and trustees are fully authorized and likewise directed to manage my estate primarily for this purpose.

13 I further authorize my said executors and trustees to use any insurance which may be made payable to my estate for immediately providing for my mother.

Item IV

I hereby direct, authorize and empower my executors and trustees to sell and otherwise dispose of all of my real estate and tangible personal property, wheresoever located, within two years from my death upon such terms as they deem best; and I hereby empower my executors and trustees to convey an absolute unconditional title to any such property, either real or personal. The proceeds of such sales are to be reinvested in such securities as my executors and trustees deem best, but not in real estate.

I further direct that all stocks, bonds, notes, mortgages, choses in action and other securities which I possess at the time of my death are to remain as then invested. However, my said executors and trustees are hereby empowered and authorized at any time to sell any securities which were on hand at my death or in which they may have invested when in their judgment the investment is not reasonably safe or the return is not adequate. In selling any real and personal property or in making any sales of any character herein authorized, the purchasers are not required to look to or be responsible for the proceeds of such sales.

My executors and trustees furthermore are not required to either hold any securities or reinvest in any securities in accordance with the statutes of the State of Tennessee or any other State, but are to invest and manage same according to their best judgment and in their sound dis-

cretion and they are not to be held personally liable if they do so. The purpose of this provision is to leave my executors and trustees free to exercise their sound discretion notwithstanding any legal or statutory requirement as to investments by either executors or trustees.

14 *Item V*

Upon the death of my mother I hereby direct my executors and trustees to convert my entire estate as it then exists into cash within one year.

I hereby will and bequeath all of my property, that is all of my estate, after my mother's death to be distributed in cash as follows:

(a) To my cousin, William Tyree Bate of Gallatin, Tennessee, twenty-five (25%) percent of my entire estate as it exists at the date of my mother's death. If he should die before I do, or before the death of my mother, said amount is to be paid to his daughter, Julia Tyree Bate, her heirs or next of kin.

As hereinafter provided, this bequest is to be tax free; and to arrive at the amount to be paid hereunder my executors and trustees are to add to the value of my estate at my mother's death the full amount of all State and Federal inheritance taxes paid after my death and twenty-five (25%) percent of the total amount so arrived at is to be considered the amount of this bequest.

(b) To Sam P. Walker, Jr., the son of my friend Sam P. Walker, the sum of Twenty Thousand ($20,000.00) Dollars, and in the event he should die before my death, or the death of my mother, said legacy is to go to his heirs or next of kin and is not to lapse.

(c) To Margaret Gunther and Harry Gunther, the children of my friend John George Gunther, the sum of Ten Thousand ($10,000.00) Dollars each, and in the event either should die before my death, or the death of my mother, the legacy to the deceased is to go to his or her heirs and next of kin and is not to lapse.

(d) To Frank T. Donelson, Jr., the son of my friend,
Frank T. Donelson, the sum of Twenty Thousand
15 ($20,000.00) Dollars, and in the event he should die
before my death, or the death of my mother, said legacy is to go to his heirs and next of kin and is not to lapse.

(e) To Leo G. Carter the sum of Twenty Thousand ($20,000.00) Dollars, but if the said Leo G. Carter should die before my mother, the said Twenty Thousand ($20,-

000.00) Dollars shall be equally divided between the legatees of their heirs and next of kin named in paragraphs (a), (b), (c) and (d).

(f) To Laura H. Venn, the widow of Dr. Joe H. Venn, a friend of my mother, the sum of Twenty Thousand ($20,000.00) Dollars, but if the said Laura H. Venn should die before my mother, the said Twenty Thousand ($20,000.00) Dollars shall be equally divided between the legatees or their heirs and next of kin named in paragraphs (a), (b), (c) and (d).

(g) To my cousin, Kate G. Galbreath, the widow of Percy Galbreath, the sum of Ten Thousand ($10,000.00) Dollars, and if she should die before the death of my mother said legacy is to be paid to her heirs and next of kin and is not to lapse.

(h) To the Mary Latham Chapter of the Daughters of the Confederacy the sum of Two Thousand Five Hundred ($2,500.00) Dollars.

(i) To the Elizabeth Bate Williams Chapter of the Daughters of the Confederacy the sum of Two Thousand Five Hundred ($2,500.00) Dollars.

(j) To Miss Bessie Davis, my cousin and my mother's devoted friend, of Nashville, Tennessee, the sum of Five Thousand ($5,000.00) Dollars.

I direct that my executors and trustees pay from my residuary estate all estate, inheritance, legacy or succession taxes on account of the transfer and receipt of the
16 foregoing bequests so that the legatees above will receive their legacies tax free. If there are not sufficient funds on hand at the time of my mother's death to pay all of the legacies above set forth, then I direct that the legacy in paragraph (a) be computed and paid as set forth in said paragraph and that the other legacies be reduced on a pro rata basis.

Item VI

After the death of my mother and after the payment of all of the legacies above set forth, and after the payment of all taxes, expenses of administration and the expenses of this trust, I hereby direct my said executors and trustees to pay the balance of my estate after the same has been converted into cash as herein provided as follows: to the Mary Galloway Home for Aged Women, The Crippled Children's Hospital School, at present located at 2009 Lamar Avenue, The Home for Incurables Founded by the King's Daughters and Sons of Tennessee, and the

Sunshine Home for Aged Men, all located in Memphis, Tennessee, equally, share and share alike. This is a residuary bequest, however, and is not to infringe on any of the other legacies hereinbefore provided.

Item VII

In the event my mother should predecease me the trusteeship hereinbefore set forth would be unnecessary and I hereby authorize and empower the executors herein named to distribute my estate as herein set forth with exactly the same full powers granted to my executors and trustees.

I have hereby nominated and named the same parties both as executors and as trustees of my estate, and as such I hereby authorize my executors to deliver and transfer to the said trustees all of my estate which comes into their hands as executors regardless of any law to the contrary, and a receipt to the said executors by said trustees shall be a receipt in full for all purposes, including the settling of my estate by said executors in any court.

17 In the event Mr. Milburn K. Noell should predecease me or should die before the death of my mother, I hereby direct that no executor or trustee shall be appointed in his stead, but all the powers hereby jointly vested in my executors and trustees shall be exercised by the remaining executor and trustee, Union Planters National Bank and Trust Company.

In witness whereof I have hereunto set my hand at Memphis, Tennessee, this 27th day of March, 1942.

(Sgnd) William Bate Williams.

Signed by the said William Bate Williams, as and for his last will and testament, in the sight and presence of us, the undersigned, who, at his request, and in his sight and presence and in the sight and presence of each other, have subscribed our names hereto as attesting witnesses the day and date above written.

F. T. Donelson,
Chester Lowrance,
Ivan V. Massengill.

19 *Exhibit "B"—Filed October 8, 1946*

(File Endorsement omitted)

Estate of William Bate Williams

1.

Statement—August 10, 1945

	Assessed	Deficiency	Total Liability
On return	$60,448.01	$33,081.52	$95,450.14
On waiver	1,920.61		
Totals	$62,368.62	$33,081.52	$95,450.14

Adjustments to Net Estate

Net estate for basic tax RAR 3/7/45	$212,043.80
Add: Deduction for charities disallowed	114,855.30
Net estate for basic tax as adjusted	$326,899.11
Net estate for additional tax as adjusted	$366,899.11

Deduction for charity is denied on the following grounds:

(a) Article III of decedent's will which says:

"I hereby devise and bequeath all of my property, real, personal and mixed, wheresoever located, including all insurance of any kind, to the said Milburn K. Noel and the Union Planters National Bank and Trust Company, as Trustees, to be administered for the use and benefit of my beloved mother, Elizabeth Bate Williams, for and during her natural life, with the full power and authority herein conferred,

"I hereby direct both my executors and my trustees to pay to my said mother the sum of Seven Hundred Fifty ($750.00) Dollars a month to be used by her as she sees fit. In the event the income from my estate is not sufficient to pay the said Seven Hundred Fifty ($750.00) Dollars each month, then my executors and trustees are hereby empowered, authorized and directed to encroach on the corpus of the
20 estate to pay said amount and to sell any of my property, real or personal, for this purpose.

"In addition to this amount my said executors and trustees are authorized and empowered to use and expend in their discretion any portion of my estate, either income or principal, for the pleasure, comfort and welfare of my mother.

"The first object to be accomplished in the administration and management of my estate and this

trust is to take care of and provide for my mother in such manner as she may desire and my executors and trustees are fully authorized and likewise directed to manage my estate primarily for this purpose."

(b) Under Section 81.46 of Regulations 105, it is stated that

"Conditional bequests—If as of the date of decedent's death the transfer to charity is dependent upon the performance of some act or the happening of a precedent event in order that it might become effective, no deduction is allowable unless the possibility that charity will not take is so remote as to be negligible. If an estate or interest has passed to or is vested in charity at the time of decedent's death and such right or interest would be defeated by the performance of some act or the happening of some event which appeared to have been highly improbable at the time of decedent's death, the deduction is allowable.

"If the legatee, devisee, donee, or trustee is empowered to divert the property or fund, in whole or in part, to a use or purpose which would have rendered it, to the extent that it is subject to such power, not deductible had it been directly so bequeathed, devised, or given by the decedent, deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of such power."

(c) Renunciation of the previous contained in said Article III of decedent's will was not timely.

Recomputation of Tax

Basic Tax:			
On first block	$250,000	$6,500.00	
On bal. $76,889.11 @ 4%		3,075.96	
Total		$9,575.96	
Less: 80% credit for State Inh. Tax		7,660.77	
Net			$1,915.19
Addition tax:			
On first block of $250,000		$65,700.00	
On bal. $116,969.10 @ 32%		37,410.91	

Less Gross Basic Tax	$103,110.91 9,575.96	
		$93,534.95
Total liability		95,450.14
Less: Tax paid with return	$60,488.01	
Tax paid on waiver	1,920.61	
		62,368.62
Deficiency		$33,081.52

23 *Exhibit "C"—Filed October 8, 1946*

(File Endorsement Omitted.)

To: Collector of Internal Revenue
Nashville, Tennessee

Attention: Mr. Marsh T. Polk
Reference—M. T.-E. T. 2945.

Estate of Williams,
Memphis, Tennessee—
Date of Death
July 22, 1943.

ESTATE OF WILLIAM BATE WILLIAMS

Protest of Additional Federal Estate Tax Assessment of August 10, 1945

We, the undersigned, Union Planters National Bank & Trust Company, Executor of the William Bate Williams Estate, deceased July 22, 1943, and Sam P. Walker, Attorney for Estate, Executors and Trustees, hereby file in triplicate their sworn formal protest of the deficiency assessment of Federal Estate Tax in the above estate, amounting to $33,081.52, as contained in your letter of notification, dated August 10, 1945.

The original return was filed with you in August, 1944. The return was carefully checked by your Revenue Department, and in March, 1945, a small deficiency assessment of $1,920.65 was made against this estate. It was our understanding that in agreeing to this deficiency and paying same the return as made would then be acceptable as rendered.

24 Your recent additional deficiency assessment of August 10, 1945, concerns the question of the allowance of the amount for named charitable bequest deductions made in the original return. The amount disallowed by you was $114,855.30.

The will provides as follows:

"(a) Article III of decedent's will which says:

"I hereby devise and bequeath all of my property, real, personal and mixed, wheresoever located, including all insurance of any kind, to the said Milburn K. Noell and the Union Planters National Bank and Trust Company, as trustee, to be administered for the use and benefit of my beloved mother, Elizabeth Bate Williams, for and during her natural life, with the full power and authority herein conferred.

"I hereby direct both my executors and my trustees to pay to my said mother the sum of Seven Hundred Fifty ($750.00) Dollars a month to be used by her as she sees fit. In the event the income from my estate is not sufficient to pay the said Seven Hundred Fifty ($750.00) Dollars each month, then my executors and trustees are hereby empowered, authorized and directed to encroach on the corpus of the estate to pay said amount and to sell any of my property, real or personal, for this purpose.

"In addition to this amount my said executors and trustees are authorized and empowered to use and expend in their discretion any portion of my estate, either income or principal, for the pleasure, comfort and welfare of my mother.

"The first object to be accomplished in the administration and management of my estate and this trust is to take care of and provide for my mother in such manner as she may desire and my executors and trustees are fully authorized and likewise directed to manage my estate primarily for this purpose." .....

25 "After the death of my mother and after the payment of all of the legacies above set forth, and after the payment of all taxes, expenses of administration and the expenses of this trust, I hereby direct my said executors and trustees to pay the balance of my estate after the same has been converted into cash as herein provided as follows: to the Mary Galloway Home for Aged Women,

the Crippled Children's Hospital School, at present located at 2009 Lamar Avenue, The Home for Incurables Founded by the King's Daughters and Sons of Tennessee, and the Sunshine Home for Aged Men, all located in Memphis, Tennessee, equally, share and share alike. This is a residuary bequest, however, and is not to infringe on any of the other legacies hereinbefore provided."

The question presented is the possibility of Mrs. Elizabeth Bate Williams necessity for encroachment on the corpus of this estate and thereby rendering it impossible to ascertain with reasonable certainty at this time the amount which will remain in the residuary estate for named charities.

The grounds for our protest and exceptions are as follows:

1. Mrs. Elizabeth Bate Williams, mother of deceased, now eighty-seven, with life expectancy of about three and one-half years.
2. She has no dependents—no close relatives.
3. Has an approximate $100,000.00 independent estate.
   (a) Large amount in cash in savings and bank accounts.
   (b) June 15, 1945, Mrs. Williams purchased from Executors of Estate property at 4547 Union Avenue, Memphis, Tennessee, paying $30,000.00 cash from her own estate, which nets her approximately $200.00 monthly income.

26 4. Owns her own home in Memphis; summer home, Monteagle, Tennessee.

5. Has own independent income of approximately $300.00 per month over and above and besides the $750.00 per month provided by the will.
6. In December, 1944, the estate paid Mrs. Williams in cash $16,500.00 in settlement of certain claims against the estate.
7. Her mode of living is simple and economical and in last two years her necessary expenses for her living and comfort have averaged considerably less than her monthly income under the will above.
8. No requests have been made to date on Executors for any additional amounts in this will for any purpose for over two years.
9. Monthly income of this estate, after providing $750.00 per month to Mrs. Williams, amounts to approximate-

ly $600.00 per month, which is accumulating for benefit of charitable residuary legatees.

10. Extremely remote possibility Mrs. Williams could ever need to request an encroachment on the estate due to her age, separate estate, mode of living, independent income, etc. Even if she should it is still discretionary with the Executors whether said request would be paid out of net excess monthly estate income before ever getting to the corpus.

We respectfully cite the following authorities as substantiating our contention:

The right to deduct charitable bequests is controlled by Section 303 (a) (3) of the Revenue Act of 1926, 26 U. S. C. A., Revenue Act of 1940, Section 812, subsection (d) as amended in 1942.

27 Supplementing and carrying this Revenue Act into effect the Treasury Department has issued certain regulations. See Article 44 and Article 47, Treasury Regulations 80, 1934 Ed.

These two regulations are set out in full in the case of *Meierhof v. Higgins*
129 Fed. (2) 1003.

The law on this subject has been discussed, cited and laid down in the following cases:

First National Bank v. Sneed
24 Fed. (2) 186.
Ithaca Trust Co. v. U. S.
279 U. S., 151, 73 Law Ed., 647, 49 Supreme Ct. 291.
Commissioner of Internal Revenue v. Bank of America
133 Fed. (2) 753.
First National Bank v. Sneed
24 Fed. (2), 186.
Hartford Conn. Trust Co. v. Eaton Col.
36 Fed. (2) 710.
Lucas v. Mercantile Trust Co.
43 Fed. (2) 39
Commissioner of Internal Revenue v. F. G. Bonfils Trust
115 Fed. (2), 788
Commissioner of Internal Revenue v. Bank of America, etc.
133 Fed. (2), 753
In re Bersall v. State
28 N. Y. Sup. 23

Another United States Supreme Court decision besides Ithaca Trust Company, *supra*, is

Merchants National Bank v. Commissioner of Internal Revenue
320 U. S., 256; 88 Law Ed., 55

The Trustees must exercise sound judgment and sound discretion, if they are to encroach on this estate, governed by the laws of Tennessee and not the Federal law.

28 *Smith v. Fleisch*
4th Tenn. App., 139
Vines v. Vines
143 Tenn., 317
Third National Bank v. Scribner
175 Tenn., 14
Lucas v. Mercantile Trust Co. (Supra)
Perry on Trusts, 7th Ed. Secs. 510-511 (a)
Hartford Conn. Trust Co. v. Eaton
36 Fed. (2), 710
Dana v. Dana
185 Mass., 156, 70 N. E. 49
Sparhawk v. Goldthwait
225 Mass., 414, 114 N. E., 718
Hawkins v. Graham
149 Mass., 284
Lovett v. Farnham
169 Mass., 1, 147 N. E., 246
Hall v. Carver
34 Conn., 403
Hooker v. Goodwin
91 Conn., 463, 99 Atl., 1059
Stroker v. Foster
60 N. E., 407
Farlin v. Sandburn
161 Mich., 615, 126 N. W., 634
Hoxie v. Finney
147 Mass., 616; 18 N. E., 593
Gammon v. Hassett (supra)

The United States Circuit Court of Appeals for the Fourth Circuit discusses the United States Supreme Court decision of Merchant National Bank *(supra)* in the case of *Commissioner of Internal Revenue v. Robertson's Estate et al*
141 Fed. (2), 855.

One of the most pertinent recent decisions in point on the question involved is

29 *Estate of Horace G. Wetherill, deceased (J. A. Cornett, Admr.)*

Horace G. Wetherill Trust (Crocker First National Bank of San Francisco; Board of Regents of University of Colorado 4 TC No. 79, January 31, 1945. Opinion by Van Fossan, Judge No. 6046, p. 11, Central Hanover Estate Bulletin, dated March 15th, 1945, Vol. VI, No. 3.

We respectfully request your careful reconsideration of this deficiency assessment and an abatement of this tax. If not, we request a hearing on this matter at your earliest convenience. We reserve the right to file any additional information or briefs on the subject.

Respectfully submitted

UNION PLANTERS NATIONAL BANK & TRUST COMPANY

By .....
Executor of Wm. Bate Williams Estate

.....
Sam P. Walker, Attorney,
Waring, Walker & Cox,
1905 Sterick Building

30 STATE OF TENNESSEE
COUNTY OF SHELBY

I, R. N. Lloyd, Jr., Trust Officer of Union Planters National Bank & Trust Company, who is one of the Executors and Trustees under the will of Wm. Bate Williams, make oath that the facts contained in the above protest and instrument are true to the best of my knowledge, information and belief.

Subscribed and sworn to before me,
this ..... day of September, 1945.

.....
Notary Public

My Commission expires .....

.....
R. N. Lloyd

31 *Exhibit "D"—Filed October 8, 1946*

(Filed Endorsement Omitted)

TREASURY DEPARTMENT
Washington 25
August 14, 1946

OFFICE OF
Commissioner of Internal Revenue
MT-ET-2945-Tennessee
Estate of—William Bate Williams
Date of death—July 22, 1943
Union Planters National Bank &
Trust Company, et al., Executors,
Memphis, Tennessee:

Gentlemen:

Reference is made to claim on Form 843 filed on April 18, 1946, for the refund of $35,899.12 Federal Estate tax paid in the above-named estate.

This claim seeks allowance as a deduction certain bequests to alleged exempt organizations aggregating $114,855.30. In the audit of the estate deduction was refused on the ground that by the terms of the trust agreement the trustees' power to invade corpus for the benefit of decedent's mother, Elizabeth B. Williams, is not restricted to a definite and fixed standard and that the relinquishment by Elizabeth B. Williams of her right to have the executors or trustees to "encroach upon the corpus for her benefit" was not timely made for Federal estate tax purposes.

The Federal estate tax return for the decedent's estate was due on October 22, 1944; it was filed on October 26, 1944.

Decedent's mother, the life beneficiary on Decem-
32 ber 10, 1944 attempted to renounce her right to have the executors and trustees invade the corpus of the trust for her benefit.

Section 812(d) of the Internal Revenue Code was amended by Section 408(a) of the Revenue Act of 1942, Title IV, Part I, enacted October 21, 1942, to read as follows:

"(a) Deduction in Case of Citizens and Residents:

The first sentence of Section 812(d) (relating to the deduction for charitable, etc., bequests) is amending by inserting after "The amount of all bequests, legacies, devises, or transfers" the following: "(including the interest which falls into any such bequest, legacy, devise,

or transfer as a result of an irrevocable disclaimer of a bequest, legacy, devise, transfer, or power, *of the disclaimer is made prior to the date prescribed for the filing of the* estate tax return) (italics added.)

This amendment was made applicable to estate of decedent's dying after February 10, 1939.

Item III of decedent's will provides in part:

"I hereby direct both my executors and my trustees to pay to my mother the sum of Seven Hundred Fifty ($750.00) Dollars a month to be used by her as she sees fit. In the event the income from my estate is not sufficient to pay the said Seven Hundred and Fifty ($750.00) Dollars, each month, then my executors and trustees are hereby empowered, authorized and directed to encroach on the corpus of the estate to pay said amount and to sell any of my property, real or personal, for this purpose.

In addition to this amount my said executors and trustees are authorized and empowered to use and expend in their discretion any portion of my estate, either income or principal, for the pleasure, comfort and welfare of my mother.

The first object to be accomplished in the administration and management of my estate and this trust is to take care of and provide for my mother as she may desire and my executors and trustees are fully authorized and likewise directed to manage my estate primarily for this purpose."

In Merchants National Bank of Boston v. Commissioner, 64 S. Ct. 108, November 15, 1943, estate of Ozro M. Field, the Court said:

"For a deduction under Section 303(a) (3) to be allowed, Congress and the Treasury require that a highly reliable appraisal of the amount the charity will receive, be available, and made, at the death of the testator. Rough guesses, approximations, or even the relatively accurate valuations on which the market place might be willing to act are not sufficient.

(Cf. Humes v. United States, 276 U. S. 487, 494.)

Only where the conditions on which the extent of the invasion of the corpus depends are fixed by reference to some readily ascertainable and reliably predictable facts do the amount which will be diverted from the charity and the present value of the bequest become adequately measurable. And, in these cases, the taxpayer has the

burden of establishing that the amounts which will either be spent by the private beneficiary or reach the charity are thus accurately calculable. (Cf. Bank of America National Trust & Savings Assn. v. Commissioner, 126 Fed. (2d), 48 (C. C. A.)

It is the position of the Bureau that the disclaimer was not timely filed and furthermore that the purposes for which decedent's mother could and might desire to have the funds expended cannot be reliably determined and that no fixed standard governing the amount of funds her requirements might demand can be forecast with any degree of accuracy.

34 Under the circumstances and for the reasons set forth herein your claim for the refund of $35,899.12 filed on April 18, 1945, is rejected in its entirety.

Very truly yours,

JOSEPH D. NUNAN, JR.
Commissioner
By (Signed) D. S. BLISS
Deputy Commissioner

35 In the United States District Court

(Title Omitted)

(File Endorsement Omitted)

Amendment to Complaint—Filed November 5, 1946.

Comes the plaintiffs in the above styled cause and amend their complaint as follows:

Said complaint was filed in this Honorable Court on the morning of October 8th, 1946. Your plaintiffs now show that about the time this complaint was filed on said date the mother of the Deceased, towit: Elizabeth Bate

36 Williams, died in the City of Memphis; that under the will of the Deceased she was the sole beneficiary of the life estate and the trust created and set up in said will.

Your plaintiffs further show that the said life beneficiary, towit: Elizabeth Bate Williams, did not at any time during her life make any demand whatsoever on your plaintiffs as Executors of the Estate of William Bate Williams for any sums whatsoever in excess of the amount of $750.00 per month, which was paid her and which was provided for under the terms of said will.

Your plaintiffs further show that said sum was entirely sufficient to support the deceased's mother and that not

only did she not make any demand for additional sums, but she had no necessity whatsoever for any additional sums.

Therefore, your plaintiffs aver that the said Elizabeth Bate Williams did not at any time encroach upon the corpus of the estate.

Your plaintiffs on information and belief further aver that the allegations in the original complaint with reference to the individual or personal estate of Elizabeth Bate Williams are substantially correct and that the said Elizabeth Bate Williams left a substantial estate, which is now being administered through the Probate Court of Shelby County, Tennessee.

WHEREOF, your plaintiffs again ask a judgment against the defendant for the amount originally sued for.

SAM P. WALKER
D. T. PAGE
Attorneys for Union & Planters National Bank & Trust Company, and Milburn K. Noell, Executor of the Estate of William Bate Williams,
1905 Sterick Bldg.,
Memphis, Tennessee.

37

Duly sworn to by R. N. Lloyd.
Jurat omitted in printing. (All in italics.)

39 In the District Court of the United States

(Title Omitted)

(File Endorsement Omitted)

Motion to Dismiss—Filed December 12, 1946.

Defendant moves the Court to dismiss the action because the complaint fails to state a claim against the defendant upon which relief can be granted.

HORACE FRIERSON
United States Attorney,
Attorney for Defendant
230 Custom House
Nashville 3, Tennessee

41 In the District Court of the United States

(Title Omitted)

(File Endorsement Omitted)

Opinion—Filed August 12, 1947

This matter is before the Court upon motion of the defendant to dismiss the action because the complaint fails to state a claim against the defendant upon which relief can be granted.

Plaintiff has sued defendant for the sum of $35,899.12 wrongfully collected by reason of a deficiency assessment against the estate of William Bate Williams, representing tax in the amount of $33,081.52 with interest in the amount of $2,817.60.

William Bate Williams, a resident of Shelby County, Tennessee, died testate on July 22, 1943. Plaintiff is the duly appointed and qualified executor of his last will and testament. Defendant is the Collector of Internal Revenue for the State of Tennessee.

42 The will directs that all of decedent's property be placed in trust to be administered for the use and benefit of the decedent's mother, Elizabeth Bate Williams, for and during her natural life. It directs the executors and trustees to pay to her the sum of $750.00 a month to be used by her as she sees fit, and in the event the income from the trust estate is not sufficient to pay the said sum of $750.00 each month, the executors and trustees are empowered, authorized and directed to encroach on the corpus of the estate to pay said amount and to sell any property for that purpose. The will further provides:

"In addition to this amount my said executors and trustees are authorized and empowered to use and expend in their discretion any portion of my estate, either income or principal, for the pleasure, comfort and welfare of my mother.

"The first object to be accomplished in the administration and management of my estate and this trust is to take care of and provide for my mother in such manner as she may desire and my executors and trustees are fully authorized and likewise directed to manage my estate primarily for this purpose."

Item VI of the will provides that after the death of the testator's mother, and after the payment of various specific bequests and legacies and all taxes and expenses, the balance is to be paid to four incorporated charities located in the city of Memphis, Tenaessee.

Plaintiffs respectfully show that in filing the Federal
culated the amount which would go to the charities to be
the sum of $121,869.20, which was deducted as a charitable
bequest.

On August 10, 1945, defendant disallowed the deduction
for the charitable bequests on the grounds that they had
no presently ascertainable value as of the date of the testa-
tor's death, and made a deficiency assessment against
43 the estate in the amount of $33,081.52, which was
paid, with interest.

At the time of the death of the testator, his mother was approximately eighty-five years of age. She died on October 8, 1946, at the age of eighty-eight. She had an independent estate of her own of the approximate value of $100,000.00, with an income of approximately $250.00 to $300.00 per month, in addition to the $750.00 per month provided in the will. In December, 1944, the executors paid her the sum of $16,500.00 in cash in settlement of a claim against the estate. She owned her own home in Memphis and a summer home at Monteagle, Tennessee, and had no dependents or close relatives.

The Court is of the opinion that the decision in this case is governed by the principles laid down by the Supreme Court in the case of Merchants National Bank of Boston, Executor, vs. Commissioner of Internal Revenue (320 U. S. 256), rather than the line of cases which have followed the decision of the Supreme Court in the case of Ithaca Trust Company vs. United States (279 U. S. 151), inasmuch as the case at bar does not have as strict limitations and standards imposed upon the trustee as in the Ithaca Trust Company case, the authority to encroach upon the corpus of the estate being unlimited, according to the desires of testator's mother for her pleasure, comfort and welfare, at her discretion, and no limitations or safeguards being set up in the interest of the charitable remaindermen.

The motion to dismiss is granted.

Judgment accordingly.

This 12th day of August, 1947.

ELMER D. DAVIES,
U. S. District Judge.

45 In the District Court of the United States
For the Middle District of Tennessee
Nashville Division

UNION PLANTERS NATIONAL BANK & TRUST COMPANY, ET AL. EXECUTORS, ETC.,

Plaintiffs,
Civil No. 760

v.

LIPE HENSLEE, COLLECTOR, ETC.,

Defendant.

Order Sustaining Motion to Dismiss, Etc.—
Entered September 2, 1947

This cause came on to be heard upon the defendant's motion to dismiss the action because the complaint fails to state a claim against the defendant on which relief can be granted, when the plaintiffs offered to amend the complaint, which amendment the Court was pleased to allow. And after argument of counsel and due consideration of briefs filed on behalf of the parties, and the Court being of opinion for the reasons stated in its memorandum opinion filed herein on August 12, 1947, that the motion to dismiss is well taken;

It is therefore now adjudged and ordered by the Court that the defendant's motion to dismiss the action be and the same hereby is sustained, and the plaintiffs' action is accordingly dismissed, with prejudice.

46 It is further ordered by the Court that the plaintiffs pay all the costs of this cause, for which let execution issue.

To which the Plaintiffs except.

ENTER: Sept. 2, 1947

ELMER D. DAVIES,
U. S. District Judge.

O. K.

Ward Hudgins,
United States Attorney.

Sam P. Walker,
D. T. Page,
Attorneys for Plaintiffs.

47 In the United States District Court

(Title Omitted)

(File Endorsement Omitted)

Additional Amendment to Complaint—Filed September 2, 1947

Come your plaintiffs and leave of Court having been had, amend their complaint as follows:

Plaintiff respectfully show that in filing the Federal Estate Tax Return on the estate of William Bate Williams, your plaintiffs calculated that the amount which would go to the charities was the sum of $121,869.20, which was deducted as a charitable bequest, but that later the Field Agent of the Government reduced this amount to $114,855.30, to which latter figure your plaintiffs agreed.

48 Your plaintiffs now show, however, that both of said figures were incorrect and that the calculations were too low, although your plaintiffs used what is known as Greely's Formula, as set forth in the Regulations of the United States Treasury. In fact, upon the death of Mrs. Williams the actual amount, which was distributable to the said charities was the total sum of $143,515.12, which is approximately $29,000.00 more than originally estimated.

Your plaintiffs further aver that this excess amount very largely was due to the accumulation of income from the said estate over and above the $750.00 per month payable to the testator's mother, Mrs. Elizabeth Williams.

Your plaintiffs further aver that as stated in the original complaint the standard of estimating the amount due said charities was fixed and capable of being stated in definite terms of money and that there was no uncertainty appreciably greater than the general uncertainty that attends human affairs that there would ever be an encroachment upon the corpus of said estate.

Plaintiffs again aver even if the life beneficiary had made additional demands on your plaintiffs they would have had to exhaust the said amounts which had accumulated as a result of excess income before invading the corpus of the estate.

Your plaintiffs further show that if it was possible at the present time to amend the Federal Estate Tax Return the actual amount deductible is considerably in excess of the amount which was actually claimed as a deduction.

Your plaintiffs, therefore, ask the Court to take into consideration the facts set forth in this amended complaint, which have arisen since the death of the life beneficiary

and to take into consideration the exact figures herein set forth, which could not, of course, be calculated until the death of the life beneficiary.

49 Your plaintiffs show that the allegations in this amendment are evidential of the allegations in the original complaint, that at no time was there ever any possibility of invading the corpus of this estate.

SAM P. WALKER,
D. T. PAGE,
Attorneys for Union Planters National Bank & Trust Company, and Milburn K. Noell, Executors of the Estate of William Bate Williams, 1903 Sterick Building, Memphis, Tennessee.

WARING, WALKER & COX,
Of Counsel.

Duly sworn to by R. N. Lloyd
jurat omitted in printing. (All in italics)

51 In the District Court of the United States

(Title Omitted)

(File Endorsement Omitted)

Notice of Appeal—Filed September 15, 1947.

Come the Union Planters National Bank & Trust Company and Milburn K. Noell, Executors of the Last Will and Testament of William Bate Williams, and give notice to the defendant, Lipe Henslee, that they are hereby appealing from the final order of the Court entered in the above styled cause on the 2nd day of September, 1947, dismissing the original and amended complaints, and the plaintiffs herewith file their cost bond in the sum of $250.00.

SAM P. WALKER,
D. T. PAGE,
Attorneys for Plaintiffs.

Notice of this appeal is hereby accepted, this 15th day of September, 1947.

WARD HUDGINS,
United States District Attorney
and Attorney for Defendant.

53 Bond on appeal for $250.00 approved and filed Sept. 15, 1947, omitted in printing.

55 In the District Court of the United States

(Title Omitted)

(File Endorsement Omitted)

Designation of Record—Filed September 15, 1947.

The plaintiffs hereby designate to the Clerk of this Court to be forwarded to the Clerk of the Court of Appeals for the Sixth Circuit of Cincinnati, the following:

1. The original bill, together with all exhibits attached thereto.

2. An amendment to the original bill filed in this Court on or about November 1, 1946.

3. Motion to dismiss, filed by the defendant, Lipe Henslee, on December 12, 1946.

4. Order of this Court sustaining the motion to dismiss and dismissing the original complaint and all amendments; the Court in this order further allowing the plaintiffs to file an additional amendment.

56 5. Additional amendment filed by the plaintiffs on or about September 2, 1947.

6. Notice of appeal to the United States Circuit Court of Appeal at Cincinnati accepted by the defendant and filed on the 15th day of September, 1947.

7. Cost bond in the sum of $250.00, with the United States Fidelity & Guaranty Company, of Baltimore Maryland, Surety, filed on the 15th day of September, 1947.

8. Opinion of the Court, filed August 12, 1947.

9. Designation of Record.

SAM P. WALKER,
D. T. PAGE,
Attorneys for Plaintiffs.

The foregoing designation of the record is accepted and approved by the United States District Attorney, as attorney for the defendant.

WARD HUDGINS.

57 Clerk's Certificate to foregoing transcript omitted in printing.

58 In the United States Circuit Court of Appeals
Sixth Circuit.

Cause Argued and Submitted—February 12, 1948.

(Before HICKS, SIMONS and MILLER, Circuit Judges.)

This cause is argued by Sam P. Walker for appellant and by Louise Foster for appellee and is submitted to the court.

In the United States Circuit Court of Appeals
Sixth Circuit.

Judgment—Filed March 15, 1948.

Appeal from the District Court of the United States for the Middle District of Tennessee.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Middle District of Tennessee, and was argued by counsel.

59 On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the cause remanded for proceedings consistent with the opinion herein.

61 In the United States Circuit Court of Appeals
Sixth Circuit.

No. 10576.

(File Endorsement Omitted)

UNION PLANTERS NATIONAL BANK, a Trust Company and National Bank at Memphis, Tennessee, and WILBURN K. NOELL, a resident citizen of Memphis, Tennessee, Executors of the Estate of WILLIAM BATE WILLIAMS, *Appellants*, v. LIPE HENSLEE, Individually, now residing in Davidson County, Tennessee, Collector of Internal Revenue, District of Tennessee, *Appellee*.	APPEAL from the United States District Court for the Middle District of Tennessee.

Opinion—Filed March 15, 1948.

Before HICKS, SIMONS and MILLER, Circuit Judges.

HICKS, Circuit Judge. Suit by the Executors of the Will of William Bate Williams to recover of the Collector of Internal Revenue for the District of Tennessee the sum of $35,899.12, with interest.

The court sustained defendant's motion to dismiss upon the ground that the complaint did not state a cause of action; hence this appeal.

No citation of authorities is needed to support the proposition that upon such a motion all allegations of fact, properly pleaded in the complaint and its amendments, must be taken as true and the motion to dismiss must be denied unless it clearly appears that the allegations of fact are insufficient to entitle the plaintiff to recover.

The facts as stated in the complaint and its amendments are as follows: William Bate Williams, a resident and citizen of Shelby County, Tennessee, died on July
62 22, 1943, leaving a Will of which the plaintiffs qualified as Executors. They, as such executors, made careful inventories and determined that the gross value of the estate was $508,411.17 and that the necessary expenses of administration would reduce this value to a net of $426,899.10. The will, filed as Exhibit A to the

complaint, made a number of specific bequests and contained a residuary clause directing the executors to pay the balance of the estate, when converted into cash, to, (1) The Mary Galloway Home for Aged Women; (2) The Crippled Children's Hospital School; (3) The Home for Incurables; and (4) The Sunshine Home for Aged Men. Each was a charitable institution qualified to take the bequest under the laws of Tennessee.

On October 26, 1944, appellants filed their Federal Estate Tax return which was due four days earlier. In the return they deducted the charitable bequests to the value of $121,869.20. The deductions were normally allowable under Sec. 303(a) (3) of the Revenue Act of 1926, 44 Stat. 9, as amended by Sec. 403(a) of the Revenue Act of 1934, 48 Stat. 680, if the amount of the deduction is "presently ascertainable." (Sec. 812(d) Internal Revenue Code. By the Regulations the deductions must be "ascertainable" at the time of the testator's death. Treas. Reg. 105, Sec. 81.44.

On March 9, 1945, the Collector made a deficiency assessment against the estate of $1,920.61, which was paid. On August 10, 1945, he made an additional assessment of $33,081.52, basing it upon the disallowance of the charitable bequests deducted in the return. On September 6, 1945, appellants protested this second deficiency assessment, which protest was overruled on September 26, 1945. The assessment, together with interest, was paid, and on April 18, 1946, appellants filed a claim for refund, which was denied on August 14, 1946. This suit to recover the amount of the second deficiency assessment tax, with interest, paid under protest, followed.

Our question is, whether the court erred in dismissing the complaint. We think it did. The District Court was of the opinion that the case as set forth in the complaint was governed by *Merchants National Bank of Boston, Executor, v. Commissioner of Internal Revenue*, 320 U. S. 256. It did not specifically say so, but necessarily must have concluded that the averments of the complaint failed to show that the deductions for the charitable bequests, if established, were ascertainable at the date of the testator's death, or, in other words, that the averments failed to show that the bequests to the mother would not encroach upon the corpus of the estate from which the charitable bequests would be paid.

63

In the *Merchants Bank* case, the court said, at page 261:

"For a deduction under § 303(a)(3) to be allowed, Congress and the Treasury require that a highly reliable appraisal of the amount the charity will receive be available, and made, at the death of the testator. Rough guesses, approximations, or even the relatively accurate valuations on which the market place might be willing to act are not sufficient. Cf. *Humes* v. *United States*, 276 U. S. 487, 494. Only where the conditions on which the extent of invasion of the corpus depends are fixed by reference to some readily ascertainable and reliably predictable facts do the amount which will be diverted from the charity and the present value of the bequest become adequately measurable. And, in these cases, the taxpayer has the burden of establishing that the amounts which will either be spent by the private beneficiary or reach the charity are thus accurately calculable. Cf. *Bank of America Assn.* v. *Commissioner*, 126 F. 2d 48 (C. C. A.)."

This is the latest pronouncement of the Supreme Court and we are bound by it. It would serve no good purpose to attempt to differentiate it from the previous case of *Ithaca Trust Co.* v. *United States*, 279 U. S. 151, which the opinion in the Merchants' Bank case recognized. It is enough to say that the Ithaca case is more nearly akin to our case.

The will was made Exhibit A to the complaint. The mother took a life estate only. The relevant portion thereof is found in Item 3, to wit:

"I hereby devise and bequeath all of my property, real, personal and mixed, wheresoever located, including all insurance of any kind, to the said Milburn K. Noell, and the Union Planters National Bank and Trust Company, as trustees, to be administered for the use and benefit of my beloved mother, Elizabeth Bate Williams, for and during her natural life, with the full power and authority herein conferred,

"I hereby direct both my executors and my trustees to pay to my mother the sum of Seven Hundred Fifty ($750.00) Dollars a month to be used by her
64 as she sees fit. In the event the income from my estate is not sufficient to pay the said Seven Hundred Fifty ($750.00) Dollars each month, then my executors and trustees are hereby empowered, an-

thorized and directed to encroach on the corpus of the estate to pay said amount and to sell any of my property, real or personal, for this purpose.

In addition to this amount my said executors and trustees are authorized and empowered to use and expend in their discretion any portion of my estate, either income or principal, for the pleasure, comfort and welfare of my mother.

The first object to be accomplished in the administration and management of my estate and this trust is to take care of and provide for my mother in such manner as she may desire and my executors and trustees are fully authorized and likewise directed to manage my estate primarily for this purpose.

. . . "

The appellants were not only executors but were trustees of the estate as well. They were given wide discretionary powers and it may be inferred that they were not only highly competent but well equipped for the discharge of their duties. The complaint indicates that the amounts of the charitable bequests, if they can be allowed at all were correctly set forth.

The complaint alleges certain facts which were "readily ascertainable" at the time of the testator's death. These alleged facts are in substance as follows:

Prior to the testator's death he lived with his mother in her home in Memphis and during the summer months in her home at Monteagle, Tennessee. At the time of the testator's death his mother was 85 years of age. She had no dependents or close relatives and was worth approximately $100,000.00 in her own right. She had a considerable income of her own and at her son's death made no request or demand of any character for additional sums over and above the $750.00 per month provided for her in the will nor expressed any "desire" for such. Her mode of living was simple and economical. Her actual living expenses had been considerably less than the monthly bequest.

We think that the mother's economical habits formed and maintained during her long life raises a presumption that they would continue and that this presumption was entitled to considerable weight by the court. It is
65 of course a disputable presumption but nothing appears in the complaint to rebut it.

In addition to the facts "readily ascertainable" at the time of the testator's death, the complaint avers certain

"reliably predictable" facts which turned out to be unerringly true. At the time of the testator's death his mother had a life expectancy of three years. She died at 88. Further, the complaint alleges that a reasonable survey of testator's estate at the time of his death showed that the income therefrom was producing and would produce in the future a very considerable excess in income over and above the $750.00 required to be paid monthly to the mother of testator. This prediction was conservative and according to the complaint turned out to be correct, since the executors had on hands at the time the suit was brought and after paying the $750.00 monthly bequest to the mother, more than $18,000.00 derived from income. These predictions, as to the life expectancy of testator's mother and the income the estate would produce, were something more than "rough guesses."

We think that the evidence as to what the estate would likely produce was relevant and should have been considered by the court for whatever it was worth in determining the reliability of the prediction at the time it was made.

The complaint further avers that the executors after carefully examining the facts immediately after the death of testator, concluded that there was no possibility that the life beneficiary would ever invade the corpus of the estate. This of course was a mixed question of law and fact.

Appellee insists that by the terms of testator's will the mother had the right, if she so desired, to take all of the estate and leave nothing for the charitable bequests. This contention is predicated upon the first and fourth clauses of Item 3. These clauses do not directly bequeath to the mother any part of the estate in addition to the $750.00 monthly bequest found in clause 2. Clause 1 does empower the trustees to administer the estate for the use and benefit of testator's mother for and during her natural life; and clause 4 directs that the executors and trustees manage and administer the estate so as to take care of and provide for the mother in such manner as she may desire. These clauses do not directly authorize the trustees to encroach upon the estate for this purpose and they must be read in connection with clause 37, which authorizes and em-
66 powers the executors and trustees to encroach upon the corpus of the estate for the pleasure, comfort and welfare of testator's mother only *in their discretion*. In this respect they differ from clause 2, which specifically

authorizes and empowers the executors and trustees to encroach upon the corpus to pay the $750.00 monthly bequest, and to sell any of the testator's property, real or personal, for this purpose."

We think that the conclusion of the executors and trustees, after an examination of the facts, actual and predictable, immediately after the death of testator, that there was no possibility that the mother would ever invade the corpus of the estate, might be regarded as a reasonable one. At least it should not have been regarded so unreasonable as to justify the dismissal of the case upon motion. There are borderline cases wherein deductions are allowed or disallowed, when tested by the formula in the Merchants Bank case. It will serve no good purpose to cite these cases since after all each case must stand or fall upon its own particular facts and circumstances. We have found no case wherein the question has been determined upon a motion to dismiss.

We think that the case requires a trial upon appropriate issues made up by the pleadings. We do not decide that appellants are entitled to recover, because that question is not before us. If, upon remand and trial the court should determine that appellants have not made out their case by the weight of the evidence, judgment for appellee would be indicated; but if the court should find that at the time of testator's death there was nothing more than a bare possibility, *i. e.*, a possibility so remote as to be negligible that the charitable bequests would fail, judgment for appellants would follow. *Commissioner* v. *Upjohn's Estate*, 124 Fed. (2d) 73, 76 (C. C. A. 6); *Commissioner* v. *F. G. Bonfils Trust*, 115 Fed. (2d) 788, 793 (C. C. A. 10); *Commissioner* v. *Robertson's Estate*, 141 Fed. (2d) 855, 858 (C. C. A. 4). The Robertson case cited and discussed the Merchants Bank case.

We are the better satisfied with the result arrived at because it tends to support Congressional policy toward charitable bequests.

The case is reversed and remanded for proceedings consistent herewith.

67

Clerk's Certificate to foregoing transcript omitted in printing.

68 Supreme Court of the United States

Order Allowing Certiorari—Filed October 11, 1948

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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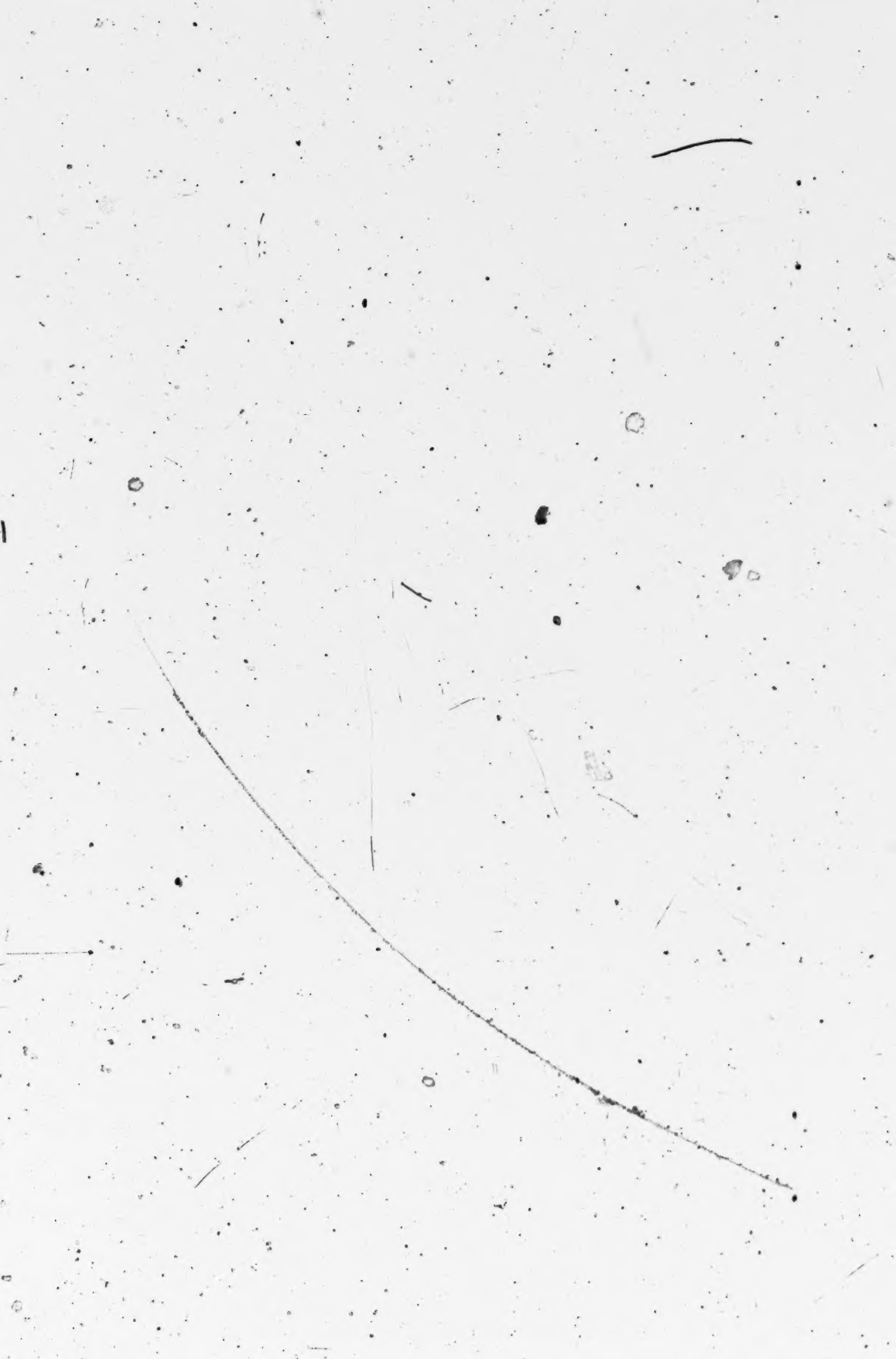

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. —

LIPE HENSLEE, INDIVIDUALLY, NOW RESIDING IN DAVIDSON COUNTY, TENNESSEE, COLLECTOR OF INTERNAL REVENUE, DISTRICT OF TENNESSEE, PETITIONER

v.

UNION PLANTERS NATIONAL BANK & TRUST COMPANY; A NATIONAL BANK AT MEMPHIS, TENNESSEE, AND WILBURN K. NOELL, A RESIDENT CITIZEN OF MEMPHIS, TENNESSEE, EXECUTORS OF THE ESTATE OF WILLIAM BATE WILLIAMS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of Lipe Henslee, individually, Collector of Internal Revenue for the District of Tennessee, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Sixth Circuit entered

March 15, 1948, reversing the judgment of the District Court for the Middle District of Tennessee, and that the judgment below be summarily reversed on the authority of *Merchants Bank* v. *Commissioner*, 320 U. S. 256.

OPINIONS BELOW

The opinion of the District Court (R. 41-43) is reported in 74 F. Supp. 113. The opinion of the Circuit Court of Appeals (R. 58-63) is reported in 166 F. 2d 993.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 15, 1948 (R. 58). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the court below departed from the decision of this Court in *Merchants Bank* v. *Commissioner*, 320 U. S. 256, in holding that a charitable bequest in the remainder of the corpus of a testamentary trust is deductible for estate tax purposes under Section 812(d) of the Internal Revenue Code and the applicable Treasury Regulations notwithstanding that the trustees are empowered in their discretion to invade the corpus "for the pleasure, comfort and welfare" of the life beneficiary, the testator's mother.

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code:

SEC. 812. NET ESTATE.

For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—

(d) [As amended by Section 408(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798, and by Section 511(a) of the Revenue Act of 1943, c. 63, 58 Stat. 21]. *Transfers for Public, Charitable, and Religious Uses.*—The amount of all bequests, legacies, devises, or transfers (including the interest which falls into any such bequest, legacy, devise, or transfer as a result of an irrevocable disclaimer of a bequest, legacy, devise, transfer, or power, if the disclaimer is made prior to the date prescribed for the filing of the estate tax return or, in the case of a decedent dying on or before October 21, 1942, if the disclaimer is made prior to September 1, 1944), to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes. * * * (26 U.S.C. 1940 ed., Supp. V, Sec. 812.)

Treasury Regulations 105, promulgated under the Internal Revenue Code:

SEC. 81.44. *Transfers for public, charitable, religious, etc., uses.*— * * *

If a trust is created for both a charitable and a private purpose, deduction may be taken of the value of the beneficial interest in favor of the former only insofar as such interest is presently ascertainable, and hence severable from the interest in favor of the private use. * * *

SEC. 81.46. *Conditional bequests.*— * * *

If the legatee, devisee, donee, or trustee is empowered to divert the property or fund, in whole or in part, to a use or purpose which would have rendered it, to the extent that it is subject to such power, not deductible had it been directly so bequeathed, devised, or given by the decedent, deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of such power.

STATEMENT

The appeal below was from the order of the District Court (R. 45-46) granting the Collector's motion to dismiss the complaint for failure to state a cause of action (R. 39). The material facts as alleged in the complaint and the amendments and exhibits thereto (R. 1-36), and found by the District Court (R. 41-43), may be summarized as follows:

William Bate Williams, the testator, died in 1943 leaving a gross estate of $508,411 and a net estate of $426,899 (R. 1-2). His will directed (R. 12) that the entire net estate be held in trust

for the use and benefit of his mother during her life, that the trustees pay to her $750 monthly out of either the income or corpus, and that—

> In addition to this amount my said executors and trustees are authorized and empowered to use and expend in their discretion any portion of my estate, either income or principal, for the pleasure, comfort and welfare of my mother.
>
> The first object to be accomplished in the administration and management of my estate and this trust is to take care of and provide for my mother in such manner as she may desire and my executors and trustees are fully authorized and likewise directed to manage my estate primarily for this purpose.

Upon the death of the mother the trustees were to convert the estate "as it then exists" into cash, and pay certain specific bequests (R. 14-16). The "balance" was then to be paid in equal shares to four named charities as a "residuary bequest" which was "not to infringe on any of the other legacies hereinbefore provided" (R. 16).

At the time of the testator's death his mother was about eighty-five years of age, and she died three years later. She had property of her own, valued at about $100,000 and yielding an income of $250 to $300 per month, in addition to which she received $16,500 as a creditor of the estate. She owned her own home, and had no dependents or close relatives. Her mode of living was simple and economical, and she never requested from the

trustees any amounts over and above the $750 which they paid to her monthly. (R. 5, 36, 43.)

In the federal estate tax return the executors-trustees sought to deduct from the taxable estate $121,869 as the value of the charitable bequests. The deduction was disallowed on the ground that the bequests had no presently ascertainable value as of the date of the testator's death. The resultant deficiency was paid, claim for refund was filed and denied, and suit for refund followed. (R. 2-4, 42-43.) The Collector moved to dismiss the complaint for failure to state a claim upon which relief could be granted (R. 39), and the District Court sustained the motion on the authority of *Merchants Bank* v. *Commissioner*, 320 U. S. 256 (R. 43). The Circuit Court of Appeals reversed and remanded the case to the District Court for trial and determination of whether the possibility of invasion of the charitable bequests was "so remote as to be negligible" (R. 63).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

(1) In holding, contrary to the decision of this Court in *Merchants Bank* v. *Commissioner*, 320 U. S. 256, that a charitable bequest in remainder of the corpus of a testamentary trust which admittedly was subject to unlimited invasion for the "pleasure, comfort and welfare" of the life beneficiary was deductible for estate tax purposes under Section 812(d) of the Internal Revenue Code

and the applicable Treasury Regulations, if the prospect of invasion of the charitable bequest was "remote".

(2) In reversing the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

It is important to the orderly administration of the tax laws that once an issue has been authoritatively determined by this Court, the lower courts adhere to the result. Where the only reason for this Court's granting certiorari in the earlier case is to settle the issue, that purpose would be frustrated by the failure of the lower courts to abide by the decision. In this case, the precise question was resolved in *Merchants Bank* v. *Commissioner*, 320 U. S. 256, which was followed by the District Court herein, but not by the Circuit Court of Appeals. If the decision below is permitted to stand, it will encourage other courts similarly to ignore the result in the *Merchants Bank* case.

1. In the *Merchants Bank* case (p. 261) the testator bequeathed the corpus of a testamentary trust to charities and empowered the trustee to invade the corpus for the "comfort, support, maintenance and/or happiness" of the life beneficiary, his widow. This Court sustained the applicable Treasury Regulations [1] which authorize deductions

[1] The pertinent provisions of Sections 81.44 and 81.46 of Treasury Regulations 105 under the Internal Revenue Code, *supra*, are the same as those of the earlier Regulations approved in the *Merchants Bank* case. Code Section 812 (d), *supra*, is substantially the same as the earlier statutory provision there involved.

for charitable bequests only insofar as they have a "presently ascertainable" value at the testator's death, and held that the extent to which the charitable remainder would be diverted for the "happiness" of the widow was not measurable by any reliable standard. The mere existence of the invasionary power—however unlikely its exercise—sufficed as a matter of law to defeat the deduction of the charitable bequests because (p. 263) the power "brought into the calculation elements of speculation too large to be overcome, notwithstanding the widow's previous mode of life was modest and her own resources substantial".

The plenary power of the trustees in the instant case (R. 12) to invade the trust corpus for the "pleasure, comfort and welfare" of the life beneficiary, the testator's mother, can stand on no different footing. It introduced elements equally speculative for purposes of computing the "presently ascertainable" value of the charitable remainder. Since the extrinsic facts alleged in the complaint, even if proved, could not affect the result, the District Court properly dismissed the complaint on the authority of the *Merchants Bank* case. (R. 43.)

The court below, while professing to be bound by the *Merchants Bank* case (R. 60), in effect refused to accept it as controlling. It reversed the District Court on the theory that the invasionary power itself was not enough to preclude deduction

of the charitable bequests, and remanded the case for trial and determination of whether the possibility of the *exercise* of the power was "so remote as to be negligible". (R. 63.)[2] In so doing the court below adopted a test urged in the dissenting opinion but unequivocally rejected by the majority of this Court in the *Merchants Bank* case. The very *existence* of such an unrestricted power rendered the charitable remainder unmeasurable, and hence non-deductible for estate tax purposes. Whatever facts bearing upon the improbability of exercise of the power might be adduced at a trial, they could have no more relevance here than in the *Merchants Bank* case.

2. The decision below is directly in conflict not only with this Court's decision in the *Merchants Bank* case, but with the decisions of other circuit courts of appeals in *Industrial Trust Co.* v. *Commissioner*, 151 F. 2d 592 (C.C.A. 1), certiorari denied, 327 U. S. 788; *DeCastro's Estate* v. *Commissioner*, 155 F. 2d 254 (C.C.A. 2), certiorari denied, 329 U. S. 727; and *Newton Trust Co.* v. *Commissioner*, 160 F. 2d 175 (C.C.A. 1).

3. No useful purpose can be served, we believe, by further briefs or arguments on the merits of this

[2] Two of the three cases upon which the court below relied (*Commissioner* v. *Upjohn's Estate*, 124 F. 2d 73 (C.C.A. 6); *Commissioner* v. *F. G. Bonfils Trust*, 115 F. 2d 788 (C.C.A. 10)) antedated this Court's decision in the *Merchants Bank* case. The other (*Commissioner* v. *Robertson's Estate*, 141 F. 2d 855 (C. C. A. 4)) involved a power to invade narrower than the one in the *Merchants Bank* case but does appear inconsistent with that case; reliance upon it by the court below emphasizes the importance of review of its decision.

case. The question here is identical with that in the *Merchants Bank* case, and the facts alleged in the complaint are in all material respects the same. In the exercise of its powers of supervisory review this Court should, we submit, grant the petition for certiorari and summarily reverse the decision below. Cf. *Burnet* v. *J. Rogers Flannery & Co.*, 286 U. S. 524. Uniformity and stability in the administration of the revenue laws are unattainable without adherence by the lower courts to the authoritative rulings of this Court. Acquiescence in the decision below will compel the District Court whose decision was here reversed to subscribe to the views of the court below, though contrary to those of this Court, and may well impel other trial tribunals whose judgments are reviewable by that court to do likewise. Unless the decision below is reversed estates within the jurisdiction of the court below, and of other courts which choose to follow its example, will enjoy preferential tax treatment.

CONCLUSION

The petition for a writ of certiorari should be granted and the decision below reversed.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

JUNE, 1948.

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 90

LIPE HENSLEE, INDIVIDUALLY, NOW RESIDING IN DAVIDSON COUNTY, TENNESSEE, COLLECTOR OF INTERNAL REVENUE, DISTRICT OF TENNESSEE, PETITIONER

v.

UNION PLANTERS NATIONAL BANK & TRUST COMPANY, A NATIONAL BANK AT MEMPHIS, TENNESSEE, AND WILBURN K. NOELL, A RESIDENT CITIZEN OF MEMPHIS, TENNESSEE, EXECUTORS OF THE ESTATE OF WILLIAM BATE WILLIAMS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the District Court (R. 24-25) is reported in 74 F. Supp. 113. The opinion of the Court of Appeals (R. 31-36) is reported in 166 F. 2d 993.

JURISDICTION

The judgment of the Court of Appeals was entered March 15, 1948. (R. 30.) The petition for a writ of certiorari was filed June 11, 1948, and was granted October 11, 1948. (R. 37.) The jurisdiction of this Court rests on 28 U. S. C., Sec. 1254.

QUESTION PRESENTED

Whether a charitable bequest in the remainder of the corpus of a testamentary trust is deductible for estate tax purposes under Section 812 (d) of the Internal Revenue Code and the applicable Treasury Regulations, where the trustees are empowered in their discretion to invade the corpus "for the pleasure, comfort and welfare" of the life beneficiary, the testator's mother, and are directed to provide for her "in such manner as she may desire."

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code:

SEC. 812. NET ESTATE.

For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—

* * * *

(d) [As amended by Section 408 (a) of the Revenue Act of 1942, c. 619, 56 Stat. 798, and by Section 511 (a) of the Revenue Act of 1943, c. 63, 58 Stat. 21]. *Transfers for Public, Charitable, and Religious Uses.*—The amount of all bequests, legacies, devises, or transfers

(including the interests which fall into any such bequest, legacy, devise, or transfer as a result of an irrevocable disclaimer of a bequest, legacy, devise, transfer, or power, if the disclaimer is made prior to the date prescribed for the filing of the estate tax return or, in the case of a decedent dying on or before October 21, 1942, if the disclaimer is made prior to September 1, 1944), to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes. * * *

(26 U. S. C. 1946 ed., Sec. 812.)

Treasury Regulations 105, promulgated under the Internal Revenue Code:

SEC. 81.44. *Transfers for public, charitable, religious, etc., uses.*— * * *

If a trust is created for both a charitable and a private purpose, deduction may be taken of the value of the beneficial interest in favor of the former only insofar as such interest is presently ascertainable, and hence severable from the interest in favor of the private use. * * *.

SEC. 81.46. Conditional bequests.— * * *

If the legatee, devisee, donee, or trustee is empowered to divert the property or fund, in whole or in part, to a use or purpose which

would have rendered it, to the extent that it is subject to such power, not deductible had it been directly so bequeathed, devised, or given by the decedent, deduction will be limited to that portion, if any, of the property or fund which is exempt from any exercise of such power. (Italics supplied.)

STATEMENT

The appeal below was from the order of the District Court (R. 26) granting the Collector's motion to dismiss the complaint for failure to state a cause of action (R. 23). The material facts as alleged in the complaint and the amendments and exhibits thereto (R. 1-23), and found by the District Court (R. 24-25), may be summarized as follows:

William Bate Williams, the testator, died in 1943 leaving a gross estate of $508,411 and a net estate of $426,899. (R. 1.) His will directed (R. 7-8) that the entire net estate be held in trust for the use and benefit of his mother during her life, that the trustees pay to her $750 monthly out of either the income or corpus, and that—

> In addition to this amount my said executors and trustees are authorized and empowered to use and expend in their discretion any portion of my estate, either income or principal, for the pleasure, comfort and welfare of my mother.
>
> The first object to be accomplished in the administration and management of my estate

> and this trust is to take care of and provide for my mother in such manner as she may desire and my executors and trustees are fully authorized and likewise directed to manage my estate primarily for this purpose.

Upon the death of the mother the trustees were to convert the estate "as it then exists" into cash, and pay certain specific bequests. (R. 9-10.) The "balance" was then to be paid in equal shares to four named charities as a "residuary bequest" which was "not to infringe on any of the other legacies hereinbefore provided". (R. 10-11.)

At the time of the testator's death his mother was about eighty-five years of age, and she died three years later. She had property of her own, valued at about $100,000 and yielding an income of $250 to $300 per month, in addition to which she received $16,500 as a creditor of the estate. She owned her own home, and had no dependents or close relatives. Her mode of living was simple and economical, and she never requested from the trustees any amounts over and above the $750 which they paid to her monthly. (R. 3-4, 22-23, 25.)

In the federal estate tax return the executors-trustees sought to deduct from the taxable estate $121,869 as the value of the charitable bequests. The deduction was disallowed. The resultant deficiency was paid, claim for refund was filed and denied, and suit for refund followed. (R. 2-3, 25.) The Collector moved to dismiss the com-

plaint for failure to state a claim upon which relief could be granted (R. 23), and the District Court sustained the motion on the authority of *Merchants Bank* v. *Commissioner*, 320 U. S. 256 (R. 43). The Court of Appeals reversed and remanded the case to the District Court for trial and determination of whether the possibility of invasion of the charitable bequests was "so remote as to be negligible". (R. 36.)

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

(1) In holding, contrary to the decision of this Court in *Merchants Bank* v. *Commissioner*, 320 U. S. 256, that a charitable bequest in the remainder of the corpus of a testamentary trust which was subject to invasion for the "pleasure, comfort and welfare" of the life beneficiary, and "in such manner as she may desire", was deductible for estate tax purposes under Section 812 (d) of the Internal Revenue Code and the applicable Treasury Regulations, if the prospect of invasion of the charitable bequest was "remote".

(2) In reversing the judgment of the District Court.

SUMMARY OF ARGUMENT

The decedent in his will authorized his trustees in their discretion to invade the charitable remainder "for the pleasure, comfort and welfare" of his mother, the life beneficiary, and directed

them to provide for her "in such manner as she may desire". Since the extent to which the charitable remainder might be diverted to satisfy the "pleasure" and "desire" of the mother was not susceptible of prediction by any reliable objective standard, the remainder had no ascertainable value as of the testator's death and accordingly was not deductible for estate tax purposes. No tenable distinction can be drawn between this case and *Merchants Bank* v. *Commissioner*, 320 U. S. 256, where this Court held that a discretionary power in the trustee to invade for the "comfort, support, maintenance, and or happiness" of the testator's widow sufficed *per se* to defeat valuation and deduction of the charitable remainder because the existence of such a power injected "elements of speculation too large to be overcome, notwithstanding the widow's previous mode of life was modest and her own resources substantial". In reversing the District Court's dismissal of the complaint and remanding this case for a determination of whether the possibility of invasion of the charitable remainder was "remote" in the light of the mother's economical living habits and independent means, the court below disregarded this Court's holding in the *Merchants Bank* case. Such extrinsic factors, even if proved, could have no more relevancy here than in that case.

ARGUMENT

Since the bequests to charity had no ascertainable value at the testator's death, they were not deductible from the gross estate under Section 812 (d) of the Internal Revenue Code and the applicable Treasury Regulations

The question here is identical with that decided in *Merchants Bank* v. *Commissioner*, 320 U. S. 256. There the testator bequeathed the corpus of a testamentary trust to charities and empowered the trustee in its discretion to invade the corpus "for the comfort, support, maintenance, and/or happiness" of the life beneficiary, his widow. The Court sustained the long-standing applicable Treasury Regulations, *supra*,[1] which provide that a charitable bequest is deductible only insofar as it has a "presently ascertainable" value as of the testator's death and is exempt from the exercise of a power to divert it to a private use, and held that the extent to which the charitable remainder might be diverted to the widow was not measurable by any reliable objective standard. The mere existence of the invasionary power sufficed to defeat the deduction because (320 U. S. at 263) "Introducing the element of the widow's happiness * * * brought into the calculation elements of speculation too large to be overcome, notwithstanding the

[1] The pertinent provisions of Section 81.44 and 81.46 of Treasury Regulations 105 under the Internal Revenue Code, *supra*, are the same as those of the earlier Regulations approved in the *Merchants Bank* case. Code Section 812 (d), *supra*, is substantially the same as the earlier statutory provision there involved.

widow's previous mode of life was modest and her own resources substantial".

The test applied by this Court in the *Merchants Bank* case was the same as that underlying its decision in *Ithaca Trust Co.* v. *United States*, 279 U. S. 151. A difference in result stemmed from a vital difference in the nature of the invasionary power. In the *Ithaca Trust Co.* case the widow was authorized to encroach upon corpus only to the extent "necessary to suitably maintain her in as much comfort as she now enjoys"; since the extent of invasion "was not left to the widow's discretion" but was measurable by a standard "fixed in fact and capable of being stated in definite terms of money" (279 U. S. at 154), the value of the charitable remainder could be determined with sufficient certainty to justify its deduction. In the *Merchants Bank* case, on the other hand, the "extent to which the principal might be used was not restricted by a fixed standard based on the widow's prior way of life" (320 U. S. at 261) and consequently the amount which the charities would eventually receive was not ascertainable with any degree of accuracy. See also *Humes* v. *United States*, 276 U. S. 487; *Robinette* v. *Helvering*, 318 U. S. 184, 188-189; *Smith* v. *Shaughnessy*, 318 U. S. 176.

The charitable remainder in this case was no more susceptible of reliable measurement than the one denied deduction in the *Merchants Bank* case.

In fact, the invasionary power here was even broader than the one there considered. The decedent in his will directed (R. 8) that his net estate be held in trust for the benefit of his mother during her life, that the trustees pay her a fixed amount monthly out of either income or corpus, and that—

> In addition to this amount my said executors and trustees are authorized and *empowered to use and expend in their discretion any portion of my estate,* either income or principal, for the *pleasure,* comfort and welfare of my mother.
>
> *The first object* to be accomplished in the administration and management of my estate and this trust is to take care of and provide for my mother *in such manner as she may desire* and my executors and trustees are fully authorized and likewise *directed to manage my estate primarily for this purpose.* (Italics ours.)

The "balance" of the estate, after payment of certain specific legacies, was given to charities; and the trustees were admonished that "This is a residuary bequest, however, which is not to infringe" on prior legacies. (R. 10-11.)

No extended argument is needed to demonstrate that under the terms of decedent's will there was no reliable method of forecasting to what extent, if at all, the charitable remainder would take effect.

Granting, *arguendo*, that the amount which might be diverted during the mother's lifetime for her "comfort and welfare" was measurable by a fixed standard, no reliable means existed for ascertaining how much the trustees in their discretion might use for her "pleasure" or how much she herself might "desire".[2] Conceivably, a substantial gift to a friend or relative might afford her "pleasure". Certainly the power to invade for her "pleasure" can stand on no different footing from the one to invade for the "happiness" of the widow in the *Merchants Bank* case. Here, as in that case (320 U. S. at 262), "The salient fact is that the purposes for which the widow [here the mother] could, and might wish to have the funds spent do not lend

[2] There appears to be nothing in the decisions of the courts of Tennessee, where the decedent resided at the time of his death, which would in any way curtail the discretionary power of invasion granted by the decedent's will. The Tennessee courts follow the general rule that a trustee's discretionary power will not be interfered with so long as he acts in good faith. "To do so would be to substitute the discretion of the court for that of the trustee". *Smith v. Fleisch*, 4 Tenn. App. 139, 146. See also *Guarantee and Trust Co.* v. *Jones*, 103 Tenn. 245, 252-253; *Miller* v. *Miller*, 149 Tenn. 463, 477-478; *Dooley* v. *Penland*, 156 Tenn. 284, 291; *Third National Bank* v. *Scribner*, 175 Tenn. 14, 35; Perry on Trusts (7th ed., 1929), Sec. 511. In *Matthews* v. *Capshaw*, 109 Tenn. 480, where the testator devised property to his wife for life with authority to sell it for the benefit of the family "in case of necessity", the court held that the wife was the sole judge of the "necessity" and that a sale by her was valid even though no actual necessity was shown. It would seem to follow *a fortiori* that a discretionary power to use corpus for the "pleasure" of the life tenant or in accordance with her "desire" would not be judicially circumscribed.

themselves to reliable prediction." That the mother died without any of the corpus having been diverted to her is of course of no consequence. To qualify for deduction from the gross estate the amount of the charitable bequest must be ascertainable as of the date of the decedent's death. *Humes* v. *United States, supra; Ithaca Trust Co.* v. *United States, supra; United States* v. *Provident Trust Co.*, 291 U. S. 272; *Taft* v. *Commissioner*, 304 U. S. 351. For all practical purposes, the retained power of invasion was equivalent to a power of revocation, and the likelihood of the exercise of the power of invasion was of no more consequence than the likelihood of the exercise of a power of revocation. The statutory allowance of a deduction for charitable bequests in Section 812 (d) of the Internal Revenue Code, *supra*, obviously was not designed to embrace the bequest of a fund which might be applied indifferently to charitable and non-charitable purposes. If any doubt on this score otherwise existed, it is dispelled by the long-standing implementing Treasury Regulations which were sustained in the *Merchants Bank* case.[3]

[3] Confirmation of the Congressional intent is contained in the amendment of Code Section 812 (d) by Section 408 (a) of the Revenue Act of 1942, c. 619, 56 Stat. 798, which permits an irrevocable disclaimer of a power to invade a charitable bequest for a private purpose if the disclaimer is made prior to the date prescribed for filing the estate tax return. See H. Rep. No. 2333, 77th Cong., 2d Sess., pp. 166-167 (1942-2 Cum. Bull. 372, 494). An untimely attempt at disclaimer was made in this case. (R. 13, 20-21.)

The District Court, relying upon the authority of the *Merchants Bank* decision, properly dismissed the complaint upon motion of the Collector. (R. 25.) The Court below, while professing to be bound by that decision, in effect refused to accept it as controlling. Proceeding on the hypothesis that the charitable remainder had an ascertainable value if the allegations in the complaint relating to the mother's economical living habits and independent resources were proved (R. 34-35), it reversed and remanded the case for a determination of whether the possibility of invasion was "so remote as to be negligible" (R. 36). The error of the court below lies in its failure to discern the essential difference between a restricted power of invasion the exercise of which is susceptible of reliable prediction by objective standards, and one the exercise of which is utterly unpredictable because dependent on subjective considerations. The extrinsic facts alleged in the complaint might be material were we dealing with a limited invasionary power like that involved in the *Ithaca Trust Co.* case. But a plenary power to invade for the "pleasure" of a life beneficiary, like one to invade for her "happiness", introduces "elements of speculation too large to be overcome" irrespective of the beneficiary's living habits and separate resources. *Merchants Bank v. Commissioner, supra*, p. 263. The very *existence* of such a power renders the charitable remainder unmeasurable, and hence

non-deductible for estate tax purposes. Indeed, it is anomalous to characterize the possibility of the exercise of the power as "remote" (or imminent), for the simple reason that the extent to which the power may be exercised is a matter of sheer guesswork. It is precisely because the likelihood of the exercise of such a power is not susceptible of reliable prediction that the value of the charitable remainder is not susceptible of reliable measurement. See *Gammons* v. *Hassett*, 121 F. 2d 229 (C.C.A. 1st), certiorari denied, 314 U. S. 673; Paul, Federal Estate and Gift Taxation, 1946 Supplement, p. 437. In remanding the case for a determination of whether the possibility of invasion was "remote", the court below ordered the trial court to consider factors which could have no more relevancy here than in the *Merchants Bank* case. Even if the extrinsic facts alleged in the complaint were proved, taxpayer "could not" sustain the burden of proof because "the extent to which the principal might be used was not restricted by a fixed standard based on the [mother's] way of life". *Merchants Bank* v. *Commissioner, supra*, p. 261.

The question in this case having been authoritatively resolved by this Court in the *Merchants Bank* case, it is important that the lower courts uniformly abide by the result. The court below has disregarded the plain tenor of this Court's holding in the *Merchants Bank* case, as well as the

decisions of the Courts of Appeals which have followed it.[4] *Industrial Trust Co.* v. *Commissioner*, 151 F. 2d 592 (C.C.A. 1st), certiorari denied, 327 U. S. 788; *DeCastro's Estate* v. *Commissioner*, 155 F. 2d 254 (C.C.A. 2d), certiorari denied, 329 U. S. 727; *Newton Trust Co.* v. *Commissioner*, 160 F. 2d 175 (C.C.A. 1st); *National Bank of Commerce of San Antonio* v. *Scofield*, 169 F. 2d 145 (C.C.A. 5th), petition for certiorari filed October 18, 1948. To permit the decision below to stand will compel the District Court whose decision was here reversed to subscribe to the views of the court below, though contrary to those of this Court, and might well impel other lower courts to do so. Unless it is reversed estates within the jurisdiction of the court below, and of other courts which choose to follow its example, will enjoy preferential tax treatment.

[4] Two of the three cases upon which the court below relied (*Commissioner* v. *Upjohn's Estate*, 124 F. 2d 73 (C.C.A. 6th); *Commissioner* v. *F. G. Bonfils Trust*, 115 F. 2d 788 (C.C.A. 10th)), antedated this Court's decision in the *Merchants Bank* case. The other (*Commissioner* v. *Robertson's Estate*, 141 F. 2d 855 (C.C.A. 4th)) involved a power to invade narrower than the one in the *Merchants Bank* case but does appear inconsistent with that case.

CONCLUSION

The judgment of the court below should be reversed.

Respectfully submitted,

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No. 90

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

90

LIPE HENSLEE, Individually, Now Residing in Davidson County, Tennessee, Collector of Internal Revenue, District of Tennessee, Petitioner,

v.

UNION PLANTERS NATIONAL BANK & TRUST COMPANY, a National Bank at Memphis, Tennessee, and WILBURN K. NOELL, a Resident Citizen of Memphis, Tennessee, Executors of The Estate of William Bate Williams, Respondents.

ANSWER AND BRIEF OF RESPONDENTS TO PETITION FOR CERTIORARI.

ROANE WARING,
SAM P. WALKER,
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ANSWER AND BRIEF OF RESPONDENTS TO PETITION FOR CERTIORARI.

William Bate Williams died in the City of Memphis on the 22nd day of July, 1943, leaving his entire estate in trust for his mother, and providing that she be paid the sum of $750.00 per month by the executors or trustees. She was not given the entire income of the estate, but a specific amount.

The will further provided that the Executors and Trustees were authorized, if necessary, to encroach upon the corpus of the estate to pay this amount and further were authorized "to use and expend in their discretion

any portion of my estate, either income or principal, for the pleasure, comfort and welfare of my mother." (R. 12).

The will further provides that upon the death of the testator's mother certain specific bequests were to be paid and the remainder or residuum of the estate was to be paid to four incorporated charities. The executors shortly after the death of the testator accurately estimated the amount due the charities and deducted this amount from the net value of the estate in computing Federal Inheritance Taxes. The Commissioner disallowed this deduction and thereupon the executors paid the amount of the tax and instituted this suit to recover this payment as a refund.

The sole question is whether the ascertained value of the charitable bequests as established by the executors was deductible in computing inheritance taxes under the applicable acts of Congress, Treasury regulations, the decisions of this Court and the facts and circumstances of this case. The amount deducted was the sum of $121,869.20.

The following facts, some of which are set out in the petition and some of which were not, were available, readily ascertainable and in fact actually ascertained by the executors shortly after the death of the testator, and the figures computed were as of his death.

The gross estate was $508,411.00, which was reduced to a net value of $426,899.00, after deducting expenses. The testator's mother was eighty-five years of age, with a life expectancy of three years (she in fact lived just about three years). She had an independent estate of

$100,000.00, which yielded her an income of between $250.00 and $300.00 a month. She had likewise received $16,500.00 as a result of being a creditor of the estate. Furthermore she owned her own home in the City of Memphis and had a summer home at Monteagle, Tennessee. Her mode of living was simple and economical. She never requested any additional amounts from either the executors or the trustees over and above the $750.00 provided for her support and maintenance. Her actual expenditures and living expenses were considerably less than $750.00 per month and she made material savings from this amount paid to her. The next annual income of the estate was considerably more than the $9,000.00 necessary to pay the monthly amount provided for the testator's mother. This fact was easily ascertained at the testator's death and was borne out by subsequent events so that there was on hand excess income of approximately $18,000.00 at the death of the testator's mother. The original complaint thus avers: (R. 6).

> "Your plaintiffs aver that the statement contained in the denial of the claim for refund dated August 14, 1945, to the effect that the funds to be expended for the life beneficiary cannot be reliably determined and that no fixed standard governing the amount of funds for the requirement of the life beneficiary is not correct. On the contrary your plaintiffs now aver that the value of the charitable bequests can and was reliably determined by your plaintiffs and that there is a fixed standard by which this value was ascertained."

Under the terms of the will and the facts and circumstances surrounding the testator and the life beneficiary at his death the Circuit Court of Appeals did not as an absolute matter of law determine that the respondents

could recover. The Court, however, did hold that the cause should be remanded for trial and if there was no more than a bare possibility—that is a possibility so remote as to be negligible, that the charitable bequests would fail or that there would be an invasion of the corpus of the estate, then the respondents would be entitled to recover. Generally speaking the Circuit Court of Appeals held that the facts as heretofore set forth and as alleged in the complaint were more akin to the case of the

Ithaca Trust Co. v. U. S., 279 U.S., 151,

than to the case of

Merchants Bank v. Commissioner, 320 U.S., 256.

The former case establishes the doctrine that a charitable bequest following a life estate with provisions for invading the corpus of the estate is deductible if there is no uncertainty appreciably greater than that general uncertainty that attends human affairs of invading the charitable bequests.

The petition for certiorari at page 2 states the question presented. We submit that this is not the question presented at all. On the contrary the real question presented is whether or not the Circuit Court of Appeals follows the decisions of this Court in laying down the following rule of law:

> "We think that the case requires a trial upon appropriate issues made up by the pleadings. We do not decide that the appellants are entitled to recover, because that question is not before us. If, upon remand and trial the court should determine that appellants have not made out their case by the weight of the evidence, judgment for appellee would

be indicated; but if the court should find that at the time of testator's death there was nothing more than a bare possibility, i. e., a possibility so remote as to be negligible that the charitable bequests would fail, judgment for appellants would follow. Commissioner v. Upjohn's Estate, 124 Fed. (2d), 73, 76 (C. A. A. 6); Commissioner v. F. G. Bonfils Trust, 115 Fed. (2d) 788, 793 (C. C. A. 10); Commissioner v. Robertson's Estate, 141 Fed. (2d) 855, 858 (C. C. A. 4). The Robertson case cited and discussed the Merchants Bank case."

Furthermore the petition for certiorari at page 6 under the heading "Specification of Errors to be Urged" undertakes to state what the Circuit Court of Appeals held. This statement is not correct as the Circuit Court of Appeals did no hold what the petition for certiorari at this point says. The Specification of Error says that the trust was admittedly subject to unlimited invasion for the benefit of the life beneficiary and further that the bequest was deductible if the prospect of invasion of the charitable bequest was "remote". These statements are incorrect because the right to invade the estate was not unlimited and uncontrolled, but definitely vested in the discretion of the executors and trustees. This discretion as a matter of law must be, exercised fairly, honestly and in good faith, as we will point out later in this brief. Therefore, the Specification of Errors is not a correct statement of what the Circuit Court of Appeals held or of the question involved in the petition. There is only one question really involved in this petition and that is whether the opinion of the Circuit Court of Appeals correctly sets forth the proper rule of law to be followed in the trial of this case. The ground presented by the petition seeking a certiorari are that the opinion of the

Circuit Court of Appeals is contrary to one decision of this Court and is in conflict with the decisions of several other Circuit Courts of Appeals.

The answer to this entire proposition is that the certiorari should be denied because the opinion and ruling of the Circuit Court of Appeals is in exact accord with the principles of law laid down by this Court. A certiorari will not be granted to correct any finding of facts, but only if the rules of law laid down by the Circuit Court of Appeals are contrary to the decisions of this Court or are in conflict with the decisions of other Circuit Courts of Appeal.

The petition only mentions one case from this Court, towit: Merchants Bank v. Commissioner, Supra, and then states that the Circuit Court of Appeals ignored this decision while professing to be bound by it. The petition very carefully omits any mention of the case of Ithaca Trust Co. v. Commissioner Supra.

It was urged in the Circuit Court of Appeals by the respondents in this case that the principles of law in the Merchants Bank case and the Ithaca case are substantially the same. The law as laid down by these cases is simply that where facts are readily ascertainable at the testator's death which show that there is no possibility or uncertainty appreciably greater than the general uncertainty that attends human affairs of invading the corpus of an estate for the benefit of the life tenant then the remainder over to charities is deductible. This is the language of the Ithaca case. The language of the Merchants Bank case is that the charitable bequests are deductible where there is a highly reliable appraisal of the amount the charity will receive and then goes on to say:

> "Only where the conditions which the extent of invasion of the corpus depends are fixed by reference to some readily ascertainable and reliably predictable facts do the amount which will be diverted from charity and the present value of the bequest become adequately measurable."

The whole intent of Congress was to encourage charitable bequests and for this reason it provided that such bequests should be deducted.

Treasury Regulation 105 Sec. 81.44 carries the intent of Congress into effect by providing that the beneficial interest to charities is deductible where it is "presently ascertainable." When we examine the opinions of the two Supreme Court cases and the opinion of the Circuit Court of Appeals it is readily ascertainable that there is no conflict at all. The Merchants Bank case and the Ithaca case in substance lay down the same principle of law as was followed by the Circuit Court of Appeals in its opinion.

The executors in this case could readily ascertain and did ascertain the facts surrounding the estate and the testator's mother at his death and these facts show beyond a doubt that there was no possibility of invading the corpus of this estate. The statement in the petition that the opinion held that the deduction could be made if the prospect of the invasion of the charitable bequest was "remote" is not correct. The Circuit Court of Appeals did not hold this. A mere reading of the opinion is a complete answer to this incorrect statement. The question presented here is not identical with that presented in the Merchants Bank case at all. The will is not the same nor are the facts surrounding the testator and the life beneficiary the same.

The statement that the certiorari should be granted because the Circuit Court of Appeals has not followed the decision of this case and thereby laid down a precedent that will prevent an orderly enforcement of the tax law is not correct. The only question involved here is whether the Circuit Court of Appeals was correct in remanding this case for a trial and laying down the correct principle of law to be followed at such trial. It is no ground for a certiorari that this Court should pass on factual matters or construction of wills, or even on the question of the right of a trustee to invade the corpus of an estate. This Court is not concerned with these matters, but is only concerned with correct rules of law to be followed in allowing such charitable deductions.

The opinion of the Circuit Court of Appeals quotes from the Merchants Bank case and cites the Ithaca case and lays down a rule that is in conformity with these two cases.

The petition makes the very broad statement that the trustees have the unrestrained power to invade the corpus of this estate. This is not a correct statement of law or of fact. The trustees hold the estate for the benefit of the life beneficiary and the ultimate beneficiaries or remaindermen. They do not have an uncontrollable right to invade the estate and the facts as alleged in the original complaint show this plainly.

Trustees are required to exercise care, diligence and skill in the handling of a trust estate.

Perry on Trusts, 7th Ed. Sec. 511,
54 *American Jurisprudence*, p. 255, Sec. 321.

This rule particularly applies where there are successive beneficiaries, such as a life estate and other beneficiaries as remaindermen.

American Law Institute, Restatement of Law on Law on Trusts, Sec. 232,
Rhode Island Trust Company v. Tucker, 52 R. I. 277, 160 Atlantic 465, 83 A.L.R. 1253-1259,
Adams v. Cowen, 177 U.S. 471, 44 Law Ed. 851.

See particularly
Perry on Trusts, Sec. 539.

These authorities plainly show that the trustees did not have the uncontrolled right to invade the corpus of the trust.

The case of
Commissioner v. Robertson's Estate, 141 Fed. (2d) 855.
is very similar in facts to the case at bar and the Circuit Court of Appeals for the Fourth Circuit in this case discusses the Merchants Bank case and the Ithaca Trust Company case and then lays down the doctrine substantially as contained in the decision of the instant case by the Sixth Circuit. We call the Court's special attention to this case, not because of the facts at issue but because of the clear reasoning of the Court with reference to the two decisions of this Court on this subject. We further make the statement that the decision in the instant case is not in conflict with decisions of other Circuit Courts of Appeals.

The case of
Industrial Trust Company v. the Commissioner, 151 Fed. (2d) 592.
presents substantially the same law as laid down in the

instant case. At the end of the decision the Court cites several cases from the Circuit Courts of Appeals and then says that these cases presented different factual situations from the one before them and that is true as to this case. The will in that case gave the executors and trustees wide discretion to be exercised by them "in their sole and uncontrolled discretion and with liberality." Likewise, the situation of the beneficiaries was quite different. This situation does not exist in this case.

The case of

Decastro's Estate v. Commissioner, 155 Fed. (2d) 254.

likewise presents a different factual issue. The will in that case gave specific directions to the trustees and provided that no one should call in question the discretion of the trustees. Also, the facts and circumstances surrounding the life beneficiary and the income are not at all comparable to the instant case.

In the case of

Newton Trust Company v. Commissioner, 160 Fed. (2d) 175.

the whole situation was complicated, there were several parties involved and the same rule of law was applied in this case as laid down by the Circuit Court of Appeals in the instant case. The factual issue, however, was so entirely different, and the case is so complicated, that we submit it is not an authority that can be construed to be in conflict with the opinion of the instant case.

It is manifest that where there are different types of wills, different estates and beneficiaries of different ages with different modes of life that it may be difficult to determine the present value of a charitable bequest fol-

lowing a life estate. As long as this condition exists there will be of necessity litigation with reference to wills and estates. The ordinary administration of the tax laws has nothing to do with such litigation. Congress has authorized the deductions of charitable bequests, and, when the value of these bequests are readily ascertainable and actually ascertained by competent executors and the and the facts show that the possibility of an invasion of such bequests is nil, then we submit that the bequests should be deducted because this carries out the true intent of Congress.

We, therefore, submit that a petition for certiorari is not granted to establish uniformity and stability in the administration of revenue statutes. These matters are controlled and regulated by Congress and the Treasury Regulations.

The only question here involved is whether the Circuit Court of Appeals has followed the decisions of this Court and has in reality carried out the real intent of Congress when authorizing these deductions.

In the final analysis this Court simply enforces the intent of Congress and the Circuit Court of Appeals in its opinion states that they are better satisfied with the results arrived at because it tends to support Congressional policy toward the charitable bequests.

We respectfully submit that the petition for certiorari should be denied.

Respectfull submitted
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Petitioner,

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Respondents.

No. 90

BRIEF OF RESPONDENTS ON WRIT OF CERTIORARI.

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No. 90

BRIEF OF RESPONDENTS ON WRIT OF CERTIORARI.

ADDITIONAL STATEMENT.

The statement of facts set out in the original brief is complete as far as it goes, but it has left out several highly important facts which bear directly on the question here involved and, we, therefore, wish to make this additional statement.

William Bate Williams died in the City of Memphis on the 22nd day of July, 1943, leaving by will dated 27th of March, 1942, his entire estate in trust for his mother. His will directed the executors and trustees to pay her for life the sum of $750.00 a month, which was about one-half of the net income of the estate. His mother at the time of his death was eighty-five years old, with fixed and regular habits. The gross value of the estate was $508,511.00, which was reduced to $426,899.00 as the result of various expenses. His mother had an independent estate of about $100,000.00, which yielded her a net income of between $200.00 and $300.00 a month. She had no dependents or close relatives whatsoever. On June 15th, 1945, she purchased for $30,000.00 cash from the executors a building located at 45 Union Avenue in the City of Memphis. She owned her own home in the City of Memphis, Tennessee and likewise a summer home at Monteagle, Tennessee. It further appears that her personal expenditures were moderate and that she did not spend the $750.00 a month paid her under the will, (R. 4) but saved a part of it for her own estate.

The executors at the date of the mother's death had on hand excess income of approximately $18,000.00. No demands were ever made on the executors in excess of the $750.00 a month.

We call the Court's very particular attention to the fact that the testator had full knowledge of his income and of how much his estate would produce after his death. He did not give the entire income to his mother, as he plainly recognized that $750.00 a month was more than ample to take care of all of her needs, necessities and pleasures. The respondents allege that every single fact

set out in the complaint was readily ascertainable by the executors upon their appointment. If the executors did not know they could have readily ascertained that the testator's mother was eighty-five years old, of simple habits, was well provided for as to her dwellings by a home in Memphis and a summer home in Monteagle; that she had a substantial income of her own and always lived a plain and simple life; that her style of living, her comfort and her pleasures were easily ascertained and predictable. Any reasonable man, and these executors were that, would know beyond a doubt the manner in which the testator's mother would live and conduct herself after her son's death. She was too old to change her fixed habits of a lifetime, either as to her pleasures, comforts or welfare.

QUESTION INVOLVED.

There is only one question involved in this appeal and that is whether or not the Court of Appeals for the Sixth Circuit followed the decisions of this Court and in reality laid down and carried out the sound rule of law and the proper test to be used in ascertaining whether or not the amount of the charitable remainder of this estate was "presently ascertainable" under the terms of the will and the surrounding circumstances so as to be deductible for estate tax purposes under Section 812 (d) of the Internal Revenue Code and the applicable Treasury Regulations.

SYNOPSIS OF THE ARGUMENT.

The testator in this case lived with his mother, eighty-five years of age, neither of whom had any close relatives, and left in trust for her his entire estate with directions to his executors and trustees to pay her the sum

of $750.00 a month, which was about one-half the income of an estate with a net value of $426,899.00. The will did not leave anything directly to his mother, but granted the trustees within "their discretion" the right to invade the income or corpus of the estate for her pleasure, comfort and welfare.

The first proposition advanced in the respondents' brief is that the will when properly construed sets up a reasonable standard for measuring the charitable bequest in that the income to the life beneficiary who was eighty-five years of age, was manifestly sufficient and that there was still left a surplus of approximately $750.00 a month, which did in fact accrue and become a part of the general estate. The test laid down in the case of

Ithaca Trust Co. v. U. S., 270 U. S. 151

is proper, and the test laid down by the Court of Appeals in this case follows the Ithaca case and is not in anywise contrary to the rule laid down in the

Merchants Bank v. Commissioner, 320 U. S. 256.

The provisions of the will are not so vague and uncertain that the value of the charitable bequest is not "presently ascertainable." The position of the respondents is that the provisions of this will must be examined and that the facts and circumstances surrounding the testator, his executors and trustees and his mother, the life beneficiary, are pertinent and should be examined in order to determine whether the possibility of an invasion of the corpus is so remote as to be nil. All of the facts and circumstances in this case show beyond a doubt that there was never any possibility of invading the corpus of this estate and that therefore the possibility of invasion was nil.

The further proposition is advanced that the discretion of these trustees must be exercised in a proper and reasonable manner and that no invasion or demand by the life beneficiary of a capricious nature would be allowed under the discretion vested in the trustees. It is the duty of the trustees not only to protect the life beneficiary but likewise the remaindermen and charities in the residuary clause. The law does not allow a trustee to favor either class and this legal principal would so limit the right of the trustees to invade this estate under the facts and circumstances as to render such invasion so remote as to be a nullity. The legal principal, therefore, involved prevents the trustees from yielding to an extravagant or capricious demand from the life beneficiary. There is no reason why, under the terms of this will, the facts and circumstances surrounding the testator and the life beneficiary cannot be carefully examined in order to determine the possibility of an invasion. The rule advanced by the petitioner is technical and prevents the carrying out of the legitimate intent of Congress to foster and promote charitable bequests.

The wording of this will, the amount of the estate, the limited amount given to the life beneficiary, her age, character and mode of living are all such that if these facts are clearly established then the possibility of an invasion of the corpus of the estate is so remote as to be nil. The intent of Congress was to encourage charitable bequests and should be carried out and not limited by technical requirements. There is nothing in the Treasury Regulation or in the Merchants National Bank case which limits the inquiry into all the facts. It is, therefore, asked that the judgment of the Court of Appeals be affirmed.

ARGUMENT.

The brief of the petitioner in its "Specifications of Errors to be Urged" on page six makes the statement that the Court of Appeals held that the charitable bequests were deductible if the prospect of the invasion of the charitable bequest was "remote." The Court of Appeals did not hold this. It held as follows:

> "We think that the case requires a trial upon appropriate issues made up by the pleadings. We do not decide that appellants are entitled to recover, because that question is not before us. If, upon remand and trial the court should determine that appellants have not made out their case by the weight of the evidence, judgment for appellee would be indicated; but if the court should find that at the time of testator's death there was nothing more than a bare possibility, i. e., a possibility so remote as to be negligible that the charitable bequests would fail, judgment for appellants would follow. Commissioner v. Upjohn's Estate, 124 Fed. (2d) 73, 76, (C.C.A. 6); Commissioner v. F. G. Bonfils Trust, 115 Fed. (2d) 788, 793 (C.C.A. 10); Commissioner v. Robertson's Estate, 141 Fed. (2d) 855, 858 (C.C.A. 4). The Robertson case cited and discussed the Merchants Bank case."

The distinction between the prospects of a remote invasion and the prospect of an invasion "so remote as to be negligible" is plain and manifest and needs no further presentation.

The testator, of course, knew his mother, her habits and above all her character. He, of course, had no close relatives and was primarily concerned with his old mother. Knowing all this, he left her ample provision, but did not leave her anything absolutely, or even the whole income from his estate.

In presenting its case the petitioner in substance takes the position that under the terms of this will no extraneous facts or circumstances can be considered at all. The brief takes the theory that the question of whether the charitable bequests can be deducted is governed solely by the exact terms of the will, without regard to the facts which are absolutely necessary in order to determine what the will really means.

There are two principal and fundamental cases in this Court which lay down the broad rule of law which govern the right to deduct charitable bequests where there is a life estate created with a right to invade the corpus. The first case is

Ithaca Trust Company v. United States, 279 U. S. 151; 73 Law Ed. 647

where the rule is stated as follows:

> "On June 15, 1921, Edwin C. Stewart died, appointing his wife and the Ithaca Trust Company executors and the Ithaca Trust Company trustee of the trusts created by his will. He gave the residue of his estate to his wife for life with authority to use from the principal any sum 'that may be necessary to suitably maintain her in as much comfort as she now enjoys.' After the death of the wife there were bequests in trust for admitted charities. The case presents two questions, the first of which is whether the provision for the maintenance of the wife made the gifts to charity so uncertain that the deduction of the amount of those gifts from the gross estate under Section 403 (a) (3), supra, in order to ascertain the estate tax, connot be allowed. Humes v. United States, 276 U. S. 487, 494; 72 L. ed. 667, 670, 48 Sup. Ct. Rep. 347. This we are of opinion must be answered in the negative. The principal that could be used was only so much as might be necessary to continue the comfort then enjoyed. The standard

was fixed in fact and capable of being stated in definite terms of money. It was not left to the widow's discretion. The income of the estate at the death of the testator and even after debts and specific legacies had been paid was more than sufficient to maintain the widow as required. There was no uncertainty appreciably greater than the general uncertainty that attends human affairs."

Following the above case this matter was under consideration by this Court in the case of the

Merchants National Bank v. the Commissioner, 320 U. S. 256, 88 L. ed. 35

where the Court says:

"For a deduction under section 303 (a) (3) to be allowed, Congress and the Treasury require that a highly reliable appraisal of the amount the charity will receive be available, and made, at the death of the testator. Rough guesses, approximations, or even the relatively accurate valuations on which the market place might be willing to act are not sufficient. Cf. Humes v. United States, 276 U. S. 487, 494, 72 L. ed. 667, 670, 48 S. Ct. 347."

"Only where the conditions on which the extent of invasion of the corpus depends are fixed by reference to some readily ascertainable and reliably predictable facts do the amount which will be diverted from the charity and the present value of the bequest become adequately measurable. And, in these cases, the taxpayer has the burden of establishing that the amounts which will either be spent by the private beneficiary or reach the charity are thus accurately calculable. Cf. Bank of America Nat. Trust & Sav. Assoc. v. Commissioner of Internal Revenue, 126 F (2d) 48 (CCA 9th)."

It has always been the contention of the respondents that the test or rule laid down in these two cases is sub-

stantially the same, and the petitioner's brief at page 9 agrees with this proposition.

The Treasury Regulation, Section 81.44, set out in the petitioner's brief at page 3, states that where the bequest is "presently ascertainable" it is deductible.

Our position in this case is that under the terms of this will when properly construed and under the facts and circumstances surrounding the testator and the life beneficiary that the bequests to charity were presently ascertainable, and, therefore, should be deducted. The petitioner's entire brief is based on the proposition that the Merchant's Bank case, supra, laid down the absolute rule that a will of this character renders it impossible to ascertain the money value of charitable bequests because of the uncertainty of invasion without regard to the surrounding facts and circumstances. The will in the Merchants Bank case provided that the trustee was authorized to invade the corpus of the estate "in its sole discretion" and further shall exercise that discretion with liberality in favor of the wife. Likewise the entire income from the estate was given to the wife for her life. The present will does not authorize or allow the life beneficiary to invade the corpus of the estate at all. It directs that the estate be managed to suit the desires of the life beneficiary, but does not authorize an invasion of the corpus to gratify such desires. This clause is purely a clause controlling management. In addition, the trustees are authorized to invade the corpus within their *discretion*. There is nothing whatever said in the will about "sole discretion" or "absolute discretion," nor are the executors or trustees authorized or directed to do whatever the life beneficiary may desire.

The whole case presented in the petition is that the word "pleasure" as used in this will has created a condition of such uncertainty as to render the "presently ascertainable" value of the charitable bequests so vague as to prohibit or prevent their deduction.

We submit that the use of this mere word "pleasure" has not in substance changed the meaning of this will at all. How could anyone possibly conceive that a woman eighty-five years of age would change her fixed habits of a lifetime so as to make extraordinary demands or that the executors, or trustees would subject themselves to litigation, or to a surcharge by yielding to unreasonable demands. We agree with the petitioner that a bequest of a fund which might be applied to either charitable or non-charitable purposes is not deductbile. We insist, however, that the facts and circumstances surrounding this testator and his will must be examined in order to ascertain the probable or remote results of a clause authorizing an invasion of the corpus of the estate.

The second paragrph of Section 81.46 of the Treasury Regulations is set out at pages 3 and 4 of the petitioner's brief. However, in construing this regulation we submit that the entire section is pertinent. We are, therefore, setting it out in full:

> "Section 81.46 Conditional Bequests.—If as of the date of decedent's death the transfer to charity is dependent upon the performance of some act or the happening of a precedent event in order that it might become effective, no deduction is allowable unless the possibility that charity will not take is so remote as to be negligible. If an estate or interest has passed to or is vested in charity at the time of decedent's death and such right or interest would be defeated

by the performance of some act or the happening of some event which appeared to have been highly improbable at the time of decedent's death, the deduction is allowable.

If the legatee, devisee, donee, or trustee is empowered to divert the property or fund, in whole or in part to a use or purpose which would have rendered it, to the extent that it is subject to such power, not deductible had it been directly so bequeathed, devised, or given by the decedent, deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of such power."

The first paragraph of the above section refers to conditional bequests and uses the words that if the charitable bequests would be defeated by a condition which it was so highly improbable would occur, then the bequest is deductible. This particular language shows that the real meaning of the Treasury Regulation is that surrounding facts and circumstances may be examined in ascertaining whether there is a bare possibility or one so remote as to be negligible that the corpus of an estate will be invaded. In judging this question we are compelled to ascertain the intention of the testator by reading his will as a whole, and then we are confronted with the proposition that the testator who knew the income of his estate, who knew his mother, her character, her habits and inclinations left her for life only about one-half the income of his estate. He knew and realized that this was all she would need, and, therefore, his language must be construed in view of these facts.

This testator was a bachelor, age sixty at date of death, and had lived with his mother during his lifetime. He knew the income of his estate at the time of his death and

safeguarded such income of his estate by directing and authorizing under Item IV of his will that his executors and trustees sell his real estate and tangible personal property within two years from his death and reinvest the proceeds in such securities as his executors and trustees deemed best. This, in substance, meant that the testator provided for a consistent and reliable income from his estate after death which he knew from experience would make available ample funds, without encroachment on the corpus of his estate, to pay his mother the sum of Seven Hundred Fifty ($750.00) Dollars a month plus any additional amounts, within the discretion of his executors and trustees, which might be necessary for her pleasure, comfort and welfare and to take care of and provide for her in such manner as she might desire. Such income from his estate for these purposes was calculable and ascertainable by this testator up to the date of his death and, therefore, was presently ascertainable to his executors and trustees, upon his death.

The power granted the trustees in this will is not a power of revocation and the simple answer to the entire argument advanced by the brief of petitioner along this line is that if the testator had intended his mother to have absolute control and disposition of the estate and uncontrolled right to invade it, he would have left it to her absolutely or would have so stated in his will. On the contrary he circumscribed and restricted her rights in the estate to a fixed sum each month which was about one-half of the income from the estate and the clause authorizing the invasion was sipmly to take care of emergencies and was never intended to constitute a right of revocation or an unlimited right of invasion. Besides limiting her right to one-half the income of the estate he

definitely limited her right of invasion to be governed by the sound discretion of the trustees.

There is a very clear distinction between the will set out in the Merchants Bank case and the will in this case, as we have pointed out above. We see nothing in this will, nor in the facts surrounding it, which prevents or in the least impedes the "presently ascertainable" value of these charitable bequests. The whole proposition presented is that because the word "pleasure" is used in the will that this means that the life beneficiary has the right to do anything she chooses that was for her pleasure. This ignores the fact that this testator used this word in connection with her comfort and welfare, and certainly did not mean that these conservative and sound executors would allow this estate dissipated at the mere whim of the life beneficiary. If you can ascertain by the past the standard of living of a person his or her comfort and welfare you necessarily can ascertain the expected pleasures of a woman eighty-five years of age. In short, the language of this will does not justify the position taken by the petitioner, which ignores the circumstances of the life beneficiary and the amount of the estate.

If we understand the argument in the brief of the petitioner, it is that before you can look into the surrounding circumstances you have to first ascertain a fixed standard solely from the will itself. This argument, we submit is not sound. In order to ascertain the so-called fixed standard it is necessary to examine into the extraneous facts and every case where a right of invasion is involved necessarily involves an investigation of readily ascertainable facts in order to arrive at any standard. In the present case this standard is governed by the language

of the will, by the character, habits and age of the life beneficiary and the entire situation is controlled by the sound discretion of reliable executors and trustees. The testator knew of this and any reasonable person would come to exactly the conclusion reached by the Court of Appeals after an investigation of the facts. With this situation the word "pleasure" does not inject an element of uncertainty into the situation, nor does it render the ascertainment of the value of the charitable bequests mere guess work. If the standard of comfort and welfare can be reasonably ascertained, "the pleasure" as used in this particular will is just as easily ascertained.

There are apparently two theories presented in the instant case and this Court is, therefore, called on to determine which shall prevail, and to lay down the proper and reasonable rule to be used in testing whether a charitable bequest may be deducted where the trustees are given the right of invasion within their discretion for certain specific purposes and the corpus of the estate is then left to certain specific beneficiaries, with a residuary clause to charities on the termination of the trust. The respondents submit that the real test is laid down in this case by the Court of Appeals where it says:

> "If the Court (Trial Court) should find that at the time of the testator's death there was never more than a bare possibility, i. e. a possibility so remote as to be negligible that the charitable bequests would fail, judgment for appellants would follow."

The exact terms of the will are of importance, but they are not absolutely controlling. The real test is whether under the will and all the facts and circumstances the charities are actually going to receive the bequest, and

that the possibility of an invasion of the corpus of the estate under the terms of the will is so negligible as to be nil.

The theory of the petitioner is that unless there is a fixed standard set up by the will itself then the facts surrounding the testator, the trustees and the beneficiaries can not be examined and that such facts are immaterial. In other words the charitable bequest cannot be deducted even if it is plainly and clearly shown that the possibility of an invasion of the corpus is so remote as to be nil. The Treasury Regulation in this connection merely provides that the charitable interest must be "presently ascertainable" and does not limit the method of arriving at the value of this interest.

The petitioner's brief and some of the cases that are cited therein read into this regulation the proposition that the will itself, regardless of facts and circumstances, must set up a fixed standard.

The respondents take exactly the opposite position. Congress in allowing these charitable deduction intended to encourage them. We recognize that the burden is on the taxpayer to establish all the facts and circumstances necessary to show that there is only a bare possibility of an invasion, but when this is done the real intent of Congress to allow such deductions is carried out. To rule out of consideration all of the facts and circumstances and to set up the absolute technical rule that the will alone governs is to ignore the purpose of the statute and the intent of Congress.

No real reason has been given in any of the cases cited in the petitioner's brief or in the petition itself why the

deductions should not be allowed if the facts really show that at the time of the testator's death the possibility of an invasion of the corpus was nil. The Merchants Bank case does not lay down a rule contrary to this contention. The petitioner's brief makes this claim and some of the Courts of Appeals have construed this case to mean that no facts can be considered unless the will itself sets up a fixed standared.

Your respondents ask this Court to affirm the opinion of the Court of Appeals of the Sixth Circuit and affirm the test laid down in this case by the Court of Appeals. This test is based on common sense and sound reasoning, while the test contended for by the petitioner is technical and produces results not intended by Congress. The case of

Commissioner v. Robertson, 141 Fed. (2d) 855,

was confronted with exactly this situation and after carefully examining both the Ithaca Trust case and the Merchants Bank case the Court lays down substantially the same test as set out in the opinion of the Court of Appeals in the instant case. The Court says:

> "Notwithstanding this decision, we think that the conclusions of the Tax Court in the pending case, resting as they do upon a finding of facts, must be affirmed. The respect to be given to such findings of the Tax Court, as well as the weight to be attached to its decisions on points of law, were emphasized in Dobson v. Commissioner, 320 U. S. 489, (44-1 USTC, Paragraph 9193), wherein it was said (p. 494) that 'courts, including this Court, have not paid the scrupulous deference to the tax laws' admonitions of finality, which they have to similar provisions in statutes relating to other tribunals.' We find ourselves unable to say that there is no sub-

stantial evidence here to support the finding of the Tax Court that 'the possibility that the charitable bequests would fail or be diminished was so remote as to be nil.' The frugal manner of life to which by choice the elderly couple for a long time had been accustomed, the substantial savings they had made from the wife's income in the seven year period preceding the death of the decedent, the increased savings from the wife's increased income in the three year period subsequent to the decedent's death, the profound interest of husband and wife in religious and charitable enterprise and the intimate acquaintance of the trustee with their manner of life, their wishes and their financial situation made it as certain as anything can be that the charitable bequests will never be reduced by any action on the part of the trustee or the life beneficiary under the will. At the time of the decendent's death 'there was no uncertainty as to the amount of the legacies appreciably greater than the general uncertainty that attends human affairs.' Ithaca Trust Co. v. U. S. 279 U. S. 151, (1 USTC, Paragraph 386). To hold otherwise would not only invade the province of the Tax Court but frustrate the obvious intent of Congress to encourage charitable bequests by allowing corresponding deductions from the taxable estate."

We do not deem it necessary to go into the facts and circumstances of the other cases cited by the Court of Appeals for the Sixth Circuit. There are two of them, however, to-wit:

Commissioner v. Upjohn's Estate, 124 Fed. (2d) 73.
Commissioner v. Boufils Trust, 115 Fed (2d) 788,

which are directly in point and we cite them to this Court as sustaining our position. The only answer to these cases in the petitioner's brief is that they were decided before the Merchants Bank case. Our answer to this is that the

time of the decision is not important. If the test laid down in those cases is sound then it should be followed.

DISCRETION OF TRUSTEES.

The brief of the petitioner seems to go on the theory that the executors and trustees have unlimited power of invasion and that no one can question their discretion. The will itself vests in the trustees the right to invade the estate for certain purposes "within their discretion." We have heretofore discussed the general purposes of the will; but we wish now to call the Court's attention to the authorities governing the discretion of a trustee to invade the corpus of an estate.

A number of Tennessee cases have been cited in a foot note to the petitioner's brief, but the brief fails to call attention to the fact that where any action is left to the discretion of the trustee that discretion must be exercised honestly and faithfully. The will in the present case created a trust for the life beneficiary, but likewise these trustees hold the corpus of the estate for the benefit of certain specific legatees and with a residuary clause for named charities.

Perry on Trustee and Trustees, Seventh Edition, Section 539

has laid down the law with reference to the powers and duties of a trustee who acts between the life beneficiary and the remaindermen. Section 539 says:

> "Where property is settled upon a trustee to hold in trust for one person for life, and the remainder over for some other person or persons, it is the duty of the trustee to consult the interest of both the tenant for life and the remainderman. The trustee must act impartially, and not give either an advan-

tage at the expense, or to the prejudice, of the other. The principal of the trust fund must not be converted to the use of the life cestui. (But the court may authorize the trustee to encroach upon the principal for the support of the cestuis if unforseen circumstances have swept away so much of the principal that the income is insufficient for the purpose, even if there is an express provision that no part of the principal should be paid to them.) A court of equity can correct any mismanagement between the trustee and either the tenant for life or the remainderman; it has even set aside a decree obtained by collusion between the trustee and tenant for life. The court will not allow property to be sold if the interests of remaindermen, known or unknown, would be thereby imperiled. And when the remainder takes effect, equity will compel the trustee to fulfill his last duty to the remaindermen by turning over the property to them."

The foregoing rule, when coupled with the general rule that all trustees are required to exercise care, diligence and skill plainly puts a very clear-cut limitation on the rights of the trustees to invade the corpus of this estate for the benefit of the life beneficiary. See

Perry on Trusts, Seventh Edition, Sec. 511; 54 *Am. Jurisprudence* 255., *Sec.* 321 *on Trusts.*

This rule particularly applies where there are successive beneficiaries, such as a life beneficiary and remaindermen. The rule is so well established that we merely cite the Court to the following cases:

American Law Institute, Restatement of Law on Law on Trusts, Vol. 2, Sec. 232.

Rhode Island Trust Company v. Tucker, 52 R. I. 277, 160 Atlantic 465, 83 A. L. R. 1253-1259.

Adams v. Cowen, 177 U. S. 471, 44 Law Ed. 851

We, therefore, submit that with this rule in mind there is no power of revocation granted the trustees, nor is there any power of invasion which would in anywise endanger the charities receiving these bequests. Inasmuch as the power of invasion rests in the discretion of the trustees, it is manifest, under the above rules of law, that this discretion must be exercised in a reasonable manner and in light of the readily ascertainable and reliably predictable facts. In exercising this discretion the trustees could not ignore the affluent circumstances of the testator's mother, nor the rights of the remaindermen.

In conclusion, we, therefore, submit to this Court that the test laid down by the Court of Appeals for the Sixth Circuit in the instant case is the proper rule to be followed in determining whether these bequests are deductible, and we, therefore, ask the Court to affirm the judgment of the Court of Appeals, reversing the District Court and send the case back to be tried.

ROANE WARING,
SAM P. WALKER,
D. T. PAGE,

Attorneys for Respondent.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

LIPE HENSLEE, Individually, Now Residing in Davidson County, Tennessee, Collector of Internal Revenue, District of Tennessee,
Petitioner,

vs.

UNION PLANTERS NATIONAL BANK & TRUST COMPANY, a National Bank at Memphis, Tennessee, and WILBURN K. NOELL, a Resident Citizen of Memphis, Tennessee, Executors of Estate of William Bate Williams,
Respondents.

No. 90

MOTION OF RESPONDENTS FOR LEAVE TO FILE PETITION TO REHEAR.

ROANE WARING,
SAM P. WALKER,
D. T. PAGE,
Attorneys for Respondents.

IN THE

SUPREME COURT OF THE UNITED STATES

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Respondents.

No. 90

MOTION OF RESPONDENTS FOR LEAVE TO FILE PETITION TO REHEAR.

Come your respondents and respectfully move the Court to be allowed to file their petition to rehear.

Respondents show that an opinion was handed down in this case on the 3rd day of January, 1949. Your re-

spondents' attorneys examined into the rules of the Court to ascertain the time within which a petition to rehear could be filed. Rule 33 of this Court provides that the petition may be filed within twenty-five days. Unfortunately respondents' attorneys did not have a copy of the amendments to Rule 33 and were not informed that the petition had to be filed within fifteen days.

Your respondents show that their petition to rehear was duly served on the Solicitor General of the United States and forty copies of the petition were forwarded to the Clerk of this Court, arriving on January 21, 1949. This was three days late and this motion is to correct this error and ask the Court to allow the petition to rehear to be duly filed and considered by the Court. The text books and rules of this Court which were available to counsel did not show this amendment and, therefore, the error occurred.

Respectfully submitted,

ROANE WARING,
SAM P. WALKER,
D. T. PAGE,
Attorneys for Respondents.

Sam P. Walker, one of the attorneys representing the respondents certifies that the facts stated in the above motion are true, and further that five copies of this motion have been duly forwarded to and served on the Solicitor General of the United States.

Sam P. Walker.